161 U.S. 642

1124

RECORD, CASE No. 15,099.

161-642

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~784~~ ~~430~~ 143

BERNARD OWENS, PLAINTIFF IN ERROR,

vs.

JOHN HENRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED AUGUST 8, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 1, 1893.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS, Plaintiff in Error,
vs.
BERNARD MCCLOSKEY, Testamentary Executor of John Henry, Defendant in Error. } No. 9174.

Percy S. Benedict, Esquire, for plaintiff in error.
J. R. Beckwith, Esquire, for defendant in error.

Writ of error to the circuit court of the United States, eastern district of Louisiana, from the Supreme Court of the United States, at the city of Washington, D. C., returnable within 30 days from July 13th, 1892.

Transcript of Record.

1 Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

Petition. Filed November 1, 1880.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of Bernard Owens, who resides in the city of Philadelphia, in the State of Pennsylvania, and who is a citizen of the said State of Pennsylvania, respectfully represents—

That John Henry, who is a citizen of the State of Louisiana and resides in the city of New Orleans, in said State, is justly and truly indebted unto petitioner in the full sum of ten thousand dollars, with six per cent. per annum interest thereon from 2nd of March, 1861, together with $50.23 costs, for this, to wit:

That heretofore, to wit, at the June term of 1861 of the district court for the city and county of Philadelphia, State of Pennsylvania, now the court of common pleas No. 3 of said city, county, and State, under the number 88 of the docket, your petitioner did, after due and legal proceedings according to the laws of said State, recover judgment on the seventeenth day of June, 1861, against said defendant, John Henry, and one James Feeny, *in solido*, for the sum of five thousand dollars, with six per cent. per annum interest thereon from the 2nd day of March, 1861; that the sum of

2 two hundred and eighty-five & $\frac{97}{100}$ dollars was realized upon execution upon said judgment.

That thereafter your petitioner, in order to preserve the lien

of your petitioner as against any personalty or realty owned or possessed by said defendants in said city, county, and State, did issue and make known in due form of law his certain writ of *scire facias* to said defendants, whereby said judgment was decreed on the 10th day of May, 1871, to amount to the sum of $8,482.50, with interest, at the rate of six per cent. per annum, from 10th May, 1871, together with $39.23, costs of proceedings, all of which will more fully and at large appear by reference to an authentic copy of said proceedings and judgment, hereto annexed and made part hereof.

Petitioner further alleges that heretofore, to wit, at the March term of 1866 of said district court for the said city and county of Philadelphia, State of Pennsylvania, now the court of common pleas No. —, under the number 91 of the docket, he did, after certain proceedings at law in accordance with the laws of the said State of Pennsylvania, recover judgment against said defendant, John Henry, for the sum of five thousand dollars, with six per cent. per annum interest thereon from the 2nd of March, 1861, and costs of suit; that no money was realized upon execution thereon, and that thereafter, under the laws of said State, for the purpose of preserving the lien of said judgment against any personal or real property owned by said defendant in said State, your petitioner did issue and cause to be made known unto said defendant his certain writ of *scire facias*, whereby said judgment was decreed on the 10th day of May, 1871, to amount to the sum of $8,000, with $21, costs of said proceedings,

3 all of which will more fully and at large appear by reference to an authentic copy of said proceedings and said judgment, hereto annexed and made part hereof.

Now, your petitioner alleges that the aforesaid judgments are still in full force and virtue, and that they are still due, owing, and unsatisfied by said defendant, John Henry; that they have not been paid or extinguished, in whole or in part, except the judgment herein firstly described, which is entitled to a credit of $285.97, as above set forth.

Petitioner alleges that, although thereunto amicably requested, the said defendant, John Henry, refuses to pay the amount due by him on said judgments as aforesaid.

Wherefore petitioner prays that said John Henry be cited to appear and answer this petition, and that, after due proceedings had, your petitioner do have and recover judgment against said John Henry in the full sum of ten thousand dollars, with six per cent. per annum interest thereon from the 2nd day of March, 1861, together with $50.20, costs of said proceedings, subject to a credit of $285.97, and that defendant pay costs of these proceedings.

Petitioner prays for general relief.

(Signed) W. S. BENEDICT,
ANDREW J. MURPHY,
Att'ys for Pet'r.

Copy of Proceedings in District Court of Philadelphia, No. 88 of the Docket, Marked Exhibit "A." Filed with Petition Nov'r 1, 1880.

Exemplification.

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

4 Among the records and proceedings of the late district court for the city & Co. of Phila., now court of common pleas No. 3 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 88, June term, 1861, to wit:

D. S. B.

Docket Entries.

June term, 1861.

BERNARD OWENS
vs.
JOHN HENRY, JAMES FEENY. } 88.

J. P. Owens.

Fi. fa., J., '61, 520; *sci. fa.* to revive judg., D., '65.

Judgment entered on bond and warrant of attorney, dated March 1, 1861, for $10,000, conditioned for the payment of $5,000 on the second day of March, 1861, with lawful interest for the same.

June 17, 1861.—Judgment.

5 *Bond and Warrant.*

To John A. Owens, Esq., attorney of the court of common pleas at Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, or to any other attorney of the said court or of any other court, there or elsewhere:

Whereas we, John Henry and James Feeny, of the city of Philadelphia, trading as John Henry & Co., in and by a certain obligation, bearing even date herewith, do stand bound unto Bernard Owens, of the same place, in the sum of ten thousand dollars, lawful money of the United States of America, conditioned for the payment of five thousand dollars, together with lawful interest on the same at the rate of six per cent. per annum, on the second day of March, A. D. 1861:

These are to desire and authorize you or any of you to appear for us, our and each of our heirs, executors, or administrators, in the said court or elsewhere, in an action of debt there or elsewhere brought or to be brought against us, our heirs, executors, or administrators, at the suit of the said Bernard Owens, his executors, administrators, or assigns, on the said obligation as of any term or

time, past, present, or any other subsequent term or time, there or elsewhere to be held, and confess judgment thereupon against us, our heirs, executors, or administrators, for the sum of ten thousand dollars, lawful money of the United States of America, debt, besides costs of suit, by *nom sum informatus nihil dicit* or otherwise as to you shall seem meet, and for your or any of your so doing this shall be your sufficient warrant; and we do hereby, for ourselves, our heirs, executors, and administrators, remise, release, and forever quitclaim unto the said Bernard Owens, his certain attorney, executors, administrators, and assigns, all and all manner of
6 error and errors, misprisions, misentries, defects, and imperfections whatever in the entering of the said judgment or any process or proceedings thereon or thereto or anywise touching or concerning the same.

In witness whereof we have hereunto set our hands and seals the first day of March, in the year of our Lord one thousand eight hundred and sixty-one.

JOHN HENRY. [SEAL.]
JAMES FEENY. [SEAL.]

Sealed and delivered in the presence of—
PATRICK H. CURRAN.

Fi. Fa., Debt.

CITY AND COUNTY OF PHILADELPHIA, *ss*:

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, Greeting:

We command you that of the goods and chattels, lands and tenements, of John Henry & James Feeny in your bailiwick
[SEAL.] you cause to be levied as well a certain debt of ten thousand dollars — cents, lawful money of Pennsylvania, which Bernard Owens lately, in our district court for the city and county of Philadelphia, before our judges at Philadelphia, recovered against them, as also seven dollars seventy-five cents, which to the said plaintiff in our said court were adjudged for his damages which he sustained by occasion of the detention of that debt, whereof the said defendants are convict, as appears of record, etc.

And have you that money before our judges at Philadelphia, at our said court there to be held, the first Monday of July
7 next, to render to the said plaintiff for his debt and damages aforesaid; and have you then — there this writ.

Witness the Honorable George Sharswood, doctor of laws, president of our said court, at Philadelphia, the 17th day of June, in the year of our Lord one thousand eight hundred and sixty-one.

F. A. TREGO,
Pro Prothonotary.

Sheriff's Return.

Levied upon the personal property of the defendant June 17, 1861, and sold the same July 11th, 1861, for the sum of two hundred and eighty-five $\frac{97}{100}$ dollars.

285.97.

So answers—

JAMES HARPER, *Dep. Sh'ff.*
WM. H. KERN, *Sheriff.*

Docket Entries.

Appearance docket.

March term, 1866. No. 23.

BERNARD OWENS
vs.
JOHN HENRY and JAMES FEENY. } 23.

J. P. Owens.

(Alias, M., '66, 609.)

May 23, 1867.—Warr. filed.

Sci. fa. to revive judg., M., '71, 985.

Sci. fa. to revive judg't (D. S. B., J., '61, No. 88); E. Feb. 3, 1866; ret. 1 Mon. Mar., 1866; made known as to Jas. Feeny and *nihil habet* as to def't.

Ap'l 21, 1866.—Judg't for want of an affidavit of defence.

M'ch 17, 1871.—Dams. ass'd, $6,525.

8 Appearance docket.

March term, 1866. No. 609.

BERNARD OWENS
vs.
JOHN HENRY, Who was Sued with JAMES FEENY. } 609.

J. A. Owens.

Sci. fa. to revive judg., M., '71, 985.

Alias sci. fa. to revive judg't, M., '66, No. 23; E. Mar. 19, 1866; ret. 1 Mon. April, 1866, *nihil habet.*

April 21, 1866.—Judg't for want of an affidavit of defence.

M'ch 17, 1871.—Dam. ass'd, $6,525.

Docket Entries.

Appearance docket.

March term, 1871. No. 985.

BERNARD OWENS
vs.
JOHN HENRY and JAMES FEENY. } 985.

Chas. Hart.

Als., M., '71, 1728.

Sci. fa. to revive, M., '66, No. 23 & 609; exit M'ch 17, 1871; ret. 1st Mon. Ap'l, 1871, "*nihil habet.*"

Appearance docket.

March term, 1871. No. 1728.

SAME
vs.
JOHN HENRY and JAMES FEENY. } 1728.

Id.

Ransford, Sep. 1, '80.

Als. sci fa. to revive, No. 71985; exit Ap'l 11, 1871; ret. 1st Mon. May, 1871, "*nihil habet.*"

9 May 10, 1871.—Judg't for want of an appearance on two returns of *nihil.*

Eo die, dams. ass'd, $8,482.50.

Præcipe for Sci. Fa.

June term, 1861. D. S. B.

BERNARD OWENS
vs.
JOHN HENRY and JAMES FEENY. } No. 88.

D'R S'R: Please issue a *scire facias* to revive the judgment in the above case.

Yours, JOHN P. OWENS,
Att'y for Pl'ff.

Feb. 3rd, 1866.

To the proth. of dis. court.

10 *Sci. Fa. to Revive Judg't, &c. Sci. Fa. to Revive Debt.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, Greeting:

[SEAL.] Whereas Bernard Owens lately, in our district court for the city and county of Philadelphia, to wit, in the term of

March, in the year of our Lord one thousand eight hundred and sixty-six (M., '66, 23 & 609), before our judges of our said court, at Philadelphia, by the consideration of the same court, recovered against John Henry and James Feeny as well a certain debt of six thousand five hundred and twenty-five dollars — *costs*, and also twenty dollars — fifty cents, which to the said plaintiff in our said court were adjudged for his costs and charges which — sustained by occasion of the detention of that debt, whereof the said defendants are convict, as appears of record, &c.; and whereas we have received information that although judgment as aforesaid be rendered, yet execution thereof still remains to be made, whereupon the said plaintiff hath besought us to provide for him a proper remedy in this behalf, and we, being willing that those things which in our said court are rightly done by due execution should be demanded, do command you that, by good and lawful men of your bailiwick, you make known to the said John Henry and James Feeny that they be and appear before our judges at Philadelphia, at our said court there to be held, the first Monday of April next, to show, if anything they know or have to say, why the said judgment should not be revived for the term of five years, according to the directions of the act of assembly in such case made and pro-
11 vided, and why the said plaintiff ought not to have execution against them of the debt and damages aforesaid, according to the form of the said recovery, if to them it shall seem expedient, and further to do and receive what our said court shall consider in that behalf; and have you then — there the names of those by whom you shall so make it known to them, and this writ.

Witness the Honorable J. S. Clarke Hare, doctor of laws, president of our said court, at Philadelphia, the seventeenth day of March, in the year of our Lord one thousand eight hundred and seventy-one.

D. E. FLETCHER,
Pro Prothonotary.

Sheriff's Return.

Nihil habet.
So answers—

WM. R. LEEDS, *Sheriff.*

Præcipe for Alias Sci. Fa.

Dis. Court, M. T., 1866.

BERNARD OWENS
vs.
JOHN HENRY, Who was Sued with JAMES FEENY. } No. 23, Orig., to M. T., 1866.

SIR: Please issue an *alias sci. fa.* to revive judg't.
Yours truly,
JOHN P. OWENS,
Att'y for Pl'ff.

March 19, 1866.

To prot. of dis. court.

12 *Sci. Fa. to Revive Judg't, &c. Sci. Fa. to Revive Debt.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, Greeting:

[SEAL.] Whereas Bernard Owens, lately in our district court for the city and county of Philadelphia, to wit, in the term of June, in the year of our Lord one thousand eight hundred and sixty-one, before our judges of our said court, at Philadelphia, by the consideration of the same court, recovered against John Henry and James Feeny as well a certain debt of ten thousand dollars — cents, and also eight dollars — fifty cents, which to the said plaintiff in our said court were adjudged for his costs and charges which he sustained by occasion of the detention of that debt, whereof the said defendant is convict, as appears of record, &c.;

And whereas we have received information that although judgment as aforesaid be rendered, yet execution thereof still remains to be made, whereupon the said plaintiff hath besought us to provide for him a proper remedy in this behalf, and we, being willing that those things which in our said court are rightly done by due execution should be demanded, do command you, as before we did, that by good and lawful men of your bailiwick you make known to the said John Henry, who was sued with James Feeny, as to which said Henry the sheriff returned *n. h.*, that he be and appear before our judges at Philadelphia, at our said court there to be held, the first Monday of April next, to show, if anything he knows or has to say, why the said judgment should not be revived for the term of five years, according to the directions of the act of assembly in such case made and provided, and why the said plain-
13 tiff ought not to have execution against him of the debt and damages aforesaid, according to the form of the said recovery, if to him it shall seem expedient, and further to do and receive what our said court shall consider in that behalf; and have you then — there the names of those by whom you shall so make it known to him, and this writ.

Witness the Honorable George Sharswood, doctor of laws, president of our said court, at Philadelphia, the 19th day of March, in the year of our Lord one thousand eight hundred and sixty-six.

F. A. TREGO,
Pro Prothonotary.

Sheriff's Return.

Nihil habet.
So answers—

ISAAC M. ASHTON,
Deputy Sheriff.
HENRY C. HOWELL, *Sh'ff.*

14 *Sci. Fa. to Revive Judg't, &c. Sci. fa. to Revive Debt.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, Greeting:

Whereas Bernard Owens lately, in our district court for the city and county of Philadelphia, to wit, in the term of March, [SEAL.] in the year of our Lord one thousand eight hundred and sixty-six—M., '66, 23 & 609—before our judges of our said court, at Philadelphia, by the consideration of the same court, recovered against John Henry and James Feeny as well a certain debt of six thousand five hundred and twenty-five dollars — cents, and also twenty dollars — fifty cents, which to the said plaintiff in our said court were adjudged for his costs and charges which he sustained by occasion of the detention of that debt, whereof the said defendants are convict, as appears of record, &c.;

And whereas we have received information that although judgment as aforesaid be rendered, yet execution thereof still remains to be made, whereupon the said plaintiff hath besought us to provide for him a proper remedy in this behalf, and we, being willing that those things which in our said court are rightly done by due execution should be demanded, do command you, as before we did, that, by good and lawful men of your bailiwick, you make known to the said John Henry and James Feeny that they be and appear before our judges, at Philadelphia, at our said court there to be held, the first Monday of May next, to show, if anything they know or have to say, why the said judgment should not be revived for the term of five years, according to the directions of the act of assembly in such case made and provided, and why the said plain-
15 tiff ought not to have execution against him of the debt and damages aforesaid, according to the form of the said recovery, if to him it shall seem expedient, and further to do and receive what our said court shall consider in that behalf; and have you then — there the names of those by whom you shall so make it known to him, and this writ.

Witness the Honorable J. J. Clarke Hare, doctor of laws, president of our said court, at Philadelphia, the eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-one.

B. E. FLETCHER,
Pro Prothonotary.

Sheriff's Return.

Nihil habet.
So answers—

WILLIAM R. LEEDS, *Sheriff.*

Order for Judgment. Filed May 10, 1871.

D. C. March T., 1871.

BERNARD OWENS
vs.
JOHN HENRY & JAMES FEENY. } No. 1728.

Enter judgment on two "*nihils.*"
(Signed) CHAS. HART,
Att'y for Pl'ff.

May 10, '71.

16 *Assessment of Damages.*

March T., 1871.

BERNARD OWENS
vs.
JOHN HENRY & JAMES FEENY. } No. 1728.

Amount of judgment	$6,525
Intr. fr. April 21st, 1866	1,957 50
Real debt	$8,482 50

Int. fr. May 10th, 1871.
Costs.

Please assess damages as above.
(Signed) CHAS. HART,
Att'y for Pl'ff.

May 10, '71.

To proth'y dist. c't.

I assess damages as above.
(Signed) B. E. FLETCHER, *Pro.*

Whereupon it was considered by our said court, before our said judges, that Bernard Owens recover of John Henry and James Feeny the sum of eight thousand four hundred and eighty-two $\frac{50}{100}$ dollars for his judgment, and also the further sum of thirty-two $\frac{73}{100}$ dollars for his costs and charges by him about his suit in that behalf expended, whereof the said defendant is convict, as appears of record, &c.

And the defendant in mercy, &c.

Judgment Index.

Henry, John. } Bernard Owens. D. C., M., '71. No. 985. Hart.
Feeny, James. }

17

Date.	Amount.		
1871.			
May 10.	$8,482.50.	Costs	$32 73
		Record	6 50
			$39 23

Execution Docket.

June Term, 1861. No. 520.

BERNARD OWENS
vs.
JOHN HENRY and JAMES FEENY. } 520.

J. P. Owens.
Fi. fa., D. S. B., J., '61, 88.

Real debt	$5,000 00
Int. f. M'ch 1, '61.	
Att'y & ent.	4 12
C.	12
Proth'y	3 37
Sat.	12
Fi. fa.	50

Levied & sold personal property for $285.97.

Præcipe for Appearance for Plaintiff. Filed Sept. 1, 1881.

March Term, 1871.

BERNARD OWENS
vs.
JOHN HENRY and JAMES FEENY. } No. 1728.

The proth'y will please enter my appearance for plaintiff in above judgment and case.

(Signed) J. T. RANSFORD,
Att'y for Plaintiff.

To proth'y C. P.

18 THE COMMONWEALTH OF PENNSYLVANIA, } *ss:*
County of Philadelphia,

I, William B. Mann, Esquire, prothonotary of the several courts of common pleas, numbers one, two, three, and four, respectively, for the county of Philadelphia, do certify that the foregoing is a true copy of the whole record in the cause wherein Bernard Owens is plaintiff and John Henry and James Feeny—of June term, 1861, No. 88—defendant-, as full, entire, and complete as the same remains on file in court of common pleas No. 3 for the county of Philadelphia in the case there stated.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 4 day of Sept., in the year of our Lord one thousand eight hundred and eighty.

[L. S.] (Signed) WILLIAM B. MANN,
Prothonotary.

COUNTY OF PHILADELPHIA, *ss:*

I, Jas. R. Ludlow, president judge of the court of common pleas No. 3 for the county of Philadelphia, do certify that the foregoing record and attestation, made by William B. Mann, Esquire, prothonotary of the said court, whose name is thereto subscribed and seal of office affixed, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand this 4 day of September, in the year of our Lord one thousand eight hundred and eighty.

JAS. R. LUDLOW.

COUNTY OF PHILADELPHIA, *ss:*

19 I, William B. Mann, Esquire, prothonotary of the several courts of common pleas, numbers one, two, three, and four, respectively, for the county of Philadelphia, do certify that the Honorable Jas. R. Ludlow, by whom the foregoing attestation was made and whose name is thereto subscribed, was at the time of making thereof and still is president judge of the court of common pleas No. 3 for the county of Philadelphia, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said courts this 4 day of Sept., in the year of our Lord one thousand eight hundred and eighty.

[L. S.] (Signed) WILLIAM B. MANN,
Prothonotary.

Copy of Proceedings in District Court of Philadelphia, No. 91 of the Docket, Marked Exhibit "B." Filed with Petition Nov. 1, 1880.

Exemplification.

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceedings of the late district court, city & Co. of Philad'a, now court of common pleas No. 2 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 91, March term, 1866, to wit:

20 *Docket Entries.*

March term, 1866.

BERNARD OWENS } 91.
vs.
JOHN HENRY. }

J. P. Owens.

Sci. fa. to revive judg't, M., '71, 984.

Judgment entered on bond and warrant of att'y, dated M'ch 1,

1861, for $10,000.00, conditioned for the payment of $5,000.00, with lawful interest, at six per cent. per annum, on the 2d of March, A. D. 1861.

M'ch 19, 1866.—Judgment.

21 *Bond and Warrant.*

To John A. Owens, Esq., attorney of the court of common pleas at Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, or to any other attorney of the said court or of any other court, there or elsewhere:

Whereas I, John Henry, of the city of Philadelphia, in and by a certain obligation, bearing even date herewith, do stand bound unto Bernard Owens, of the same place, in the sum of ten thousand dollars, lawful money of the United States of America, conditioned for the payment of five thousand dollars, together with lawful interest on the same, at the rate of six per cent. per annum, on the second day of March, A. D. 1861:

These are to desire and authorize you or any of you to appear for me, my heirs, executors, or administrators, in the said court or elsewhere, in an action of debt, there or elsewhere brought or to be brought against me, my heirs, executors, or administrators, at the suit of the said Bernard Owens, his executors, administrators, or assigns, on the said obligation, as of any term or time past, present, or any other subsequent term or time, there or elsewhere to be held, and confess judgment thereupon against me, my heirs, executors, or administrators, for the sum of ten thousand dollars, lawful money of the United States of America, debt, besides costs of suit, by *non sum informatus, nihil dicit,* or otherwise, as to you shall seem meet, and for your or any of your so doing this shall be your sufficient warrant; and I do hereby, for myself, my heirs, executors, and administrators, remise, release, and forever quitclaim unto the said Bernard Owens, his certain attorney, executors, administrat-
22 ors, and assigns, all and all manner of error and errors, misprisions, misentries, defects, and imperfections whatever in the entering of the said judgment or any process or proceedings thereon or thereto or anywise touching or concerning the same.

In witness whereof I have hereunto set my hand and seal the first day of March, in the year of our Lord one thousand eight hundred and sixty-one.

JOHN HENRY. [SEAL.]

Sealed and delivered in the presence of—

PATRICK H. CURRAN.

Appearance Docket.

March term, 1871. No. 984.

BERNARD OWENS
vs.
JOHN HENRY. } 984.

C. F. Hart.

Als., M., '71, 1727.

Sci. fa. to revive, D. S. B., M., '66, 91; exit M'ch 17, 1871; ret. 1st Mon. Ap'l, 1871, "*nihil habet.*"

Appearance Docket.

March term, 1871. No. 1727.

BERNARD OWENS
vs.
JOHN HENRY. } 1727.

Chas. Hart.

P. T. Ransford, Sept. 1, '80.

Als. sci. fa. to revive, M., '71, 984; exit Ap'l 11, 1871; ret. 1st Monday May, 1871, "*nihil habet.*"

May 10, 1871.—Judgment for want of an appearance on two returns of *nihil.*

Eo die, dams. ass'd, $8,000.00.

23 *Sci. Fa. to Revive Judg't, &c. Sci. Fa. to Revive Debt.*

COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, Greeting:

[SEAL.] Whereas Bernard Owens lately, in our district court for the city and county of Philadelphia, to wit, in the term of March, in the year of our Lord one thousand eight hundred and sixty-six (M., '66, 91, D. S. B.), before our judges of our said court, at Philadelphia, by the consideration of the same court, recovered against John Henry as well a certain debt of ten thousand dollars — cents, and also four dollars — fifty cents, which to the said plaintiff in our said court were adjudged for his costs and charges which he sustained by occasion of the detention of that debt, whereof the said defendant is convict, as appears of record, &c.;

And whereas we have received information that although judgment as aforesaid be rendered, yet execution thereof still remains to be made, whereupon the said plaintiff hath besought us to provide for him a proper remedy in this behalf, and we, being willing that those things which in our said court are rightly done by due

execution should be demanded, do command you that, by good and lawful men of your bailiwick, you make known to the said John Henry that he be and appear before our judges, at Philadelphia, at our said court there to be held, the first Monday of April next, to show, if anything he know or have to say, why the said judgment should not be revived for the term of five years, according to the directions of the act of assembly in such case made and provided, and why the said plaintiff ought not to have execution against him of the debt and damages aforesaid, according to the form of the said recovery, if to him it shall seem expedient, and further to
24 do and receive what our said court shall consider in that behalf; and have you then — there the names of those by whom you shall so make it known to him, and this writ.

Witness the Honorable J. I. Clark Hare, doctor of laws, president of our said court, at Philadelphia, the 17th day of March, in the year of our Lord one thousand eight hundred and seventy-one.

(Signed) B. E. FLETCHER,
Pro Prothonotary.

Sheriff's Return.

Nihil habet.
So answers—
(Signed) WM. R. LEEDS, *Sheriff.*

25 *Als. Sci. Fa. to Revive Judg't, &c. Sci. Fa. to Revive Debt.*

COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, Greeting:

[SEAL.] Whereas Bernard Owens lately, in our district court for the city and county of Philadelphia, to wit, in the term of March, in the year of our Lord one thousand eight hundred and sixty-six (M., '66, 91, D. S. B.) before our judges of our said court, at Philadelphia, by the consideration of the same court, recovered against John Henry as well a certain debt of ten thousand dollars — cents, and also four dollars — fifty cents, which to the said plaintiff in our said court were adjudged for his costs and charges which he sustained by occasion of the detention of that debt, whereof the said defendant is convict, as appears of record, &c.;

And whereas we have received information that although judgment as aforesaid be rendered, yet execution thereof still remains to be made, whereupon the said plaintiff hath besought us to provide for him a proper remedy in this behalf, and we, being willing that those things which in our said court are rightly done by due execution should be demanded, do command you that by good and lawful men of your bailiwick you make known to the said John Henry, that he be and appear before our judges at Philadelphia, at our said court there to be held, the first Monday of May next, to show, if anything he know- or has to say, why the said judgment should not be revived for the term of five

years, according to the directions of the act of assembly in such case made and provided, and why the said plaintiff ought not to have execution against him of the debt and damages aforesaid,
26 according to the form of the said recovery, if to him it shall seem expedient, and further to do and receive what our said court shall consider in that behalf; and have you then — there the names of those by whom you shall so make it known to him, and this writ.

Witness the Honorable J. I. Clark Hare, doctor of laws, president of our said court, at Philadelphia, the 11th day of April, in the year of our Lord one thousand eight hundred and seventy-one.

(Signed) B. E. FLETCHER,
Pro Prothonotary.

Sheriff's Return.

Nihil habet.
So answers—
(Signed) WM. R. LEEDS, *Sheriff.*

Order for Judgment. Filed May 10, 1871.

D. C., March T., 1871.

BERNARD OWENS
vs.
JOHN HENRY. } No. 1727.

Enter judgment on two "*nihils.*"
(Signed) CHAS. HART,
Att'y for Pl'ff.

May 10, '71.
To pro. dist. c't.

27 *Assessment of Damages.*

D. C., March T., 1871.

BERNARD OWENS
vs.
JOHN HENRY. } No. 1727.

Principal of bond	$5,000 00
Int. fr. March 19, '61	3,000 00
Real debt	$8,000

Int. fr. May 10, '71.
Costs.
(Signed) CHAS. HART,
Att'y for Pl'ff.

May 10, '71.
To pro. dist. c't.

I assess damages as above.

B. E. FLETCHER, *Pro.*

Whereupon it was considered by our said court, before our said court, before our said judges, that Bernard Owens recover of John Henry the sum of eight thousand dollars for his judgment, and also the further sum of sixteen $\frac{50}{100}$ dollars for his costs and charges by him about his suit in that behalf expended, whereof the said defendant is convict, as appears of record, &c.

And the defendant in mercy, &c.

Judgment Index.

Henry, John. Bernard Owens. D. C., M., '71. 1727. Hart. May 10, 1871.

Amount.		
$8,000.00.	Costs----	$16 50
	Record--	4 50
		$21 00

28 *Præcipe for Appearance for Plaintiff. Filed Sept.* 1, 1880.

Old District Court, March Term, 1871.

BERNARD OWENS *vs.* JOHN HENRY. } No. 1727.

The proth'y will please enter my appearance for plaintiff in above judgment and case.

(Signed) P. T. RANSFORD,
Att'y for Pl'ff.

To proth'y C. P.

29 THE COMMONWEALTH OF PENNSYLVANIA, *County of Philadelphia,* } *ss:*

I, William B. Mann, Esquire, prothonotary of the several courts of common pleas, numbers one, two, three, and four, respectively, for the county of Philadelphia, do certify that the foregoing is a true copy of the whole record in the cause wherein Bernard Owens is plaintiff and John Henry is defendant, of March term, 1866, No. 91, as full, entire, and complete as the same remains on file in court of common pleas No. 2 for the county of Philadelphia, in the case there stated.

In testimony whereof I have hereunto set my hand and [L. S.] affixed the seal of the said court this 4 day of Sept., in the year of our Lord one thousand eight hundred and eighty.

(Signed) WILLIAM B. MANN,
Prothonotary.

COUNTY OF PHILADELPHIA, *ss:*

I, J. I. Clarke Hare, president judge of the court of common pleas No. 2 for the county of Philadelphia, do certify that the foregoing

record and attestation, made by William B. Mann, Esquire, prothonotary of the said court, whose name is thereto subscribed and seal of office affixed, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand this 4 day of September, in the year of our Lord one thousand eight hundred and eighty.

J. I. CLARKE HARE.

COUNTY OF PHILADELPHIA, *ss:*

30 I, William B. Mann, Esquire, prothonotary of the several courts of common pleas, numbers one, two, three, and four, respectively, for the county of Philadelphia, do certify that the Honorable J. I. Clark Hare, by whom the foregoing attestation was made and whose name is thereto subscribed, was at the time of making thereof and still is president judge of the court of common pleas No. 2 for the county of Philadelphia, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof I have hereunto set my hand and [L. S.] affixed the seal of the said courts this 4 day of Sept., in the year of our Lord one thousand eight hundred and eighty.

(Signed) WILLIAM B. MANN,
Prothonotary.

Citation to John Henry. Issued Nov'r 1, 1880.

UNITED STATES OE AMERICA, }
District of Louisiana. }

Circuit Court of the United States, Fifth Circuit, District of Louisiana.

BERNARD OWENS }
vs. } No. 9174.
JOHN HENRY. }

To John Henry:

You are hereby summoned to comply with the demand
31 contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 1st day of November, A. D. one thousand eight hundred and eighty, and of the Independence of the United States of America the 105th year.

Teste:

[SEAL.] (Signed) T. V. COUPLAND, *D'y Clerk.*

Marshal's Return.

Received Nov. 1, 1880, by the U. S. marshal, and on the 2d day of November, 1880, I served a copy of the within citation and the accompanying petition on John Henry, defendant herein, by handing the same to him in person in the city of New Orleans.

E. S. CURRY,
D'y U. S. Marshal.

Exceptions. Filed Nov. 13, 1880.

32 Circuit Court of the United States, District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } 9174.

And now comes the defendant herein, by J. R. Beckwith, his attorney, and for peremptory exceptions herein saith that the plaintiff herein ought not to further have and maintain his said actions against this defendant, because he saith that all of the matters contained and set forth in said plaintiff's petition, in manner and form as therein set forth and pleaded, do not set forth or disclose any cause of action in said plaintiff or right of recovery against this defendant. Wherefore he prays judgment against said plaintiff, with costs, and will ever pray, &c.

(Signed) J. R. BECKWITH,
Att'y for Def't.

Order: Exceptions Fixed.

Extract from the Minute Book, November Term, 1880.

NEW ORLEANS, WEDNESDAY, *November 17th*, 1880.

Court met pursuant to adjournment.
Present: Hon. E. C. Billings, district judge.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

33 On motion of Andrew J. Murphy, of counsel for plaintiff, it is ordered that the exception herein be set down for trial on Saturday, 20th instant, at 11 a. m., and that J. R. Beckwith, Esq., be notified thereof.

Order: Exceptions Reassigned.

Extract from the Minutes.

SATURDAY, *November* 20, 1880.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

Upon the motion of the counsel for plaintiff, suggesting the absence of J. R. Beckwith, for defendant, ordered that the exception herein fixed for trial this day be reassigned for the 27th instant, at 11 a. m., and that defendant's att'y be notified thereof.

Hearing & Submission.

Extract from the Minutes.

SATURDAY, *November 27th*, 1880.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

The exception herein filed by the defendant came on for trial—Andrew J. Murphy, for plaintiff; J. R. Beckwith, for defendant—and after hearing the arguments of counsel the court took
34 time to consider.

Order: Exception Sustained and Plaintiff to Amend, &c.

Extract from the Minute Book.

NEW ORLEANS, MONDAY, *November* 29, 1880.

BERNARD OWENS
vs.
JOHN HENRY. } 9174.

This cause came on to be heard on the exception and was argued by counsel.

On consideration whereof it is ordered that the exception be sustained and the plaintiff be allowed to amend by declaring on which judgment he relies.

Supplemental Petition. Filed Feb'y 13th, 1891.

To the honorable the circuit court of the United States for the fifth judicial circuit and eastern district of Louisiana:

The supplemental petition of Bernard Owens, a citizen of the State of Pennsylvania, residing in the city of Philadelphia, with respect represents—

That he herein reiterates the allegations of his original petition and further avers—

That on the 1st day of November, 1880, your petitioner instituted an action at law in this honorable court, under the No.
35 9174 of the docket, against one John Henry and one James Feeny, *in solido*, the former of whom resides in this city and is a citizen of this State.

Petitioner represents that said action was predicated upon two judgments against the said above-named defendants, *in solido*, decreed respectively by the court of common pleas No. 3 and by the court of common pleas No. 2, both of said courts being in and for the city and county of Philadelphia, State of Pennsylvania, all of which will more fully appear by reference to the original petition, filed herein on the 1st day of November, 1880.

Your petitioner further represents that all of the said proceedings in the above-mentioned courts of the State of Pennsylvania have been duly authenticated, a copy of said proceedings, countersigned by the prothonotary and clerk of said courts, being annexed to and made part of the original petition, all of record herein.

Petitioner represents that suit was filed on the 1st day of November, 1880, and on the 12th day of November, 1880, John Henry, one of the defendants herein, filed an exception alleging that said petition disclosed no cause of action.

That on the 29th day of November, 1880, said exception was heard by the court, and after argument of counsel and consideration of said exception the court ordered the exception to be sustained in part and the plaintiff be allowed to amend by declaring upon what judgment he relied.

Petitioner represents to the court that under its judgment on said exception he was to elect as to which judgment he should prosecute, and now respect*ively* elects and informs the court that under the laws of Pennsylvania his two judgments, which were decreed respectively in the June term of 1861 and the March term of 1866, were revived upon the same day, viz., May 10th, 1871, by
36 two separate writs of *scire facias*, which said writs so reviving both judgments made both judgments of equal rank, and therefore plaintiff's right of action subsists equally as to both, and with leave of court he elects to prosecute both herein, or, in the event the court should decree that he elect as to one notwithstanding, he elects to stand upon the *scire facias* judgments of May 10th, 1871.

Petitioner further represents that under the laws of Pennsylvania these judgments so revived by said writs of *scire facias* are of the same validity as a judgment *de novo* and are in law considered as such, and hence plaintiff's right of action subsists equally as to both.

Wherefore petitioner prays that said John Henry be cited to appear and answer this supplemental petition, and, after due proceedings had, that defendants be condemned to pay *in solido* unto your petitioner the sum of $8,482.50, with six per cent. per annum interest thereon from the 10th day of May, 1871, until paid, with $60.23,

costs of proceedings had under *scire facias* to revive said judgments, together with all costs of this proceeding, and for all general and equitable relief.

(Signed) W. S. BENEDICT &
PERCY S. BENEDICT, *Of Counsel.*

Citation to John Henry. Issued Feb'y 13, 1891.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

37 Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

BERNARD OWENS }
vs. } No. 9174.
JOHN HENRY. }

The President of the United States of America to John Henry, New Orleans, Louisiana, Greeting:

You are hereby summoned to comply with the demand contained in the supplemental petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city [SEAL.] of New Orleans, this 13th day of February, A. D. one thousand eight hundred and ninety-one, and Independence of the United States of America the 115th year.

Teste: (Signed) E. R. HUNT, *Clerk,*
By H. J. CARTER, *D'y Clerk.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Feb'y 13, '91, and on the same day I served a true copy of the within citation and accompanying supplemental petition on John Henry by handing the same to him in person and leaving the same in his hands in the city of New Orleans, La.

(Signed) J. B. DONNALLY,
U. S. Marshal,
By J. E. BOEHLER,
D'y U. S. Marshal.

38 *Peremptory Exception and Answer. Filed Feb'y* 18, 1891.

Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

And now comes the said defendant, by J. R. Beckwith, his attorney, and, for peremptory exception to the said plaintiff's petition herein as amended and, as alleged, supplemented, saith that, as appears by the record herein and the petition as amended and supplemented as the same is of record in this cause, it is true that the defendant at the time of the commencement of this action was and at all times since the 5th day of September, A. D. 1865, has been a citizen and resident of the State of Louisiana and for and during said entire time above stated has not been a citizen of the State of Pennsylvania nor domiciled in said State or in any manner represented therein or a resident thereof or in any manner, either by himself or his property, subject to the laws of said State of Pennsylvania, by reason whereof and by reason of the plaintiff's pleading and exhibits of record in this cause said defendant saith that said plaintiff's petition herein, as amended and supplemented and as the same is now of record herein, does not set forth, disclose, or make any cause of action or right to recovery against this defendant by reason of anything contained in the record in this cause; wherefore defendant prays judgment against the said plaintiff's suit and demand, with costs, and will ever pray, &c.

(Signed) J. R. BECKWITH.

39 EASTERN DISTRICT OF LOUISIANA, *ss:*

John Henry, being duly sworn, deposeth and saith that the matters of fact set forth in the above exception are true as therein set forth, and that he has at all times since the 5th day of September, 1865, been a citizen of and resident in the State of Louisiana and has not since said last-mentioned date been a citizen of the State of Pennsylvania or a resident thereof or subject to the laws of Pennsylvania, either as to himself or his property, but has all of said time been subject to the laws of Louisiana.

(Signed) JNO. HENRY.

Sworn to and subscribed before me, at New Orleans, La., this 18 Feb'y, 1891.

[L. S.] (Signed) JAMES J. WOULFE,
Notary Public.

Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

Answer to Petition as Amended and Supplemented.

And now comes the said defendant, by J. R. Beckwith, his attorney, and, saving and reserving the benefit of all exception heretofore filed in this cause and the benefit of the preceding exception of no cause of action, *and* for answer to said petition as amended and supplemented in the event that said exceptions are overruled
40 and not otherwise, saith that he denies all and singular the matter set forth in said plaintiff's petition herein, except to so much thereof as avers that this defendant is a citizen of and domiciled in the State of Louisiana, which defendant admits was the case when this suit was first instituted; that the truth is that at all times since the year 1864 this defendant has been and still is a citizen of the State of Louisiana and has been a resident thereof, and that this defendant at no time since the year 1864 has been a resident of or citizen of the State of Pennsylvania or resided within the boundaries of said State or subject to the laws thereof.

And defendant specially denies that the pretended judgments or decrees referred to and set out in said petition were ever or are now in existence as lawful judgments or decrees of any court in the State of Pennsylvania of any import or effect against this defendant, either in Louisiana or in the State of Pennsylvania, and saith that the said courts in the State of Pennsylvania referred to in said petition and in the exhibits thereto annexed never acquired jurisdiction over this defendant by the lawful service of any process or citation on him nor by his voluntar*ily* appearance in said courts or in either of them, and that said pretended decrees or judgments, each and both of them, are null and void and of no effect against this defendant, and that there is no lawful record of any or either of said pretended judgments or decrees existing — either the court- of common pleas Nos. 2 and three, in the city of Philadelphia, or in any other court in the State of Pennsylvania. Wherefore he prays judgment against plaintiff, with costs.

(Signed) J. R. BECKWITH,
Att'y for Def't.

41 *Deposition of Theodore D. Rand, Taken under Commission and Filed March* 24, 1891.

Commission. Issued March 4, 1891.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit, Holding Sessions in and for the Eastern District of Louisiana.

To any judge, justice of the peace, notary public, or other officer commissioned for the State of Louisiana, authorized to administer oaths, residing in the city of Philadelphia, State of Pennsylvania:

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you Theodore D. Rand, Wm. Wagner, Jr., and —— Tchudy, and them duly examine on the annexed interrogatories and cross-interrogatories, on oath, touching and concerning certain matters and things in a case now depending in the said court, wherein Bernard Owens is plaintiff and John Henry is defendant, No. 9174, and the same examinations, so taken and reduced to writing, you certify under your hand and seal and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ, returnable in 30 days.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New [SEAL.] Orleans, this 4 day of March, anno Domino 1891, and of the Independence of the United States of America the 115 year.

(Signed) E. R. HUNT, *Clerk.*

42 In the Circuit Court of the United States for the Fifth Judicial Circuit, Eastern District of Louisiana.

BERNARD OWENS *vs.* JOHN HENRY. } No. 9174.

STATE OF PENNSYLVANIA, *Eastern District of Pennsylvania, County of Philadelphia,* } *ss:*

I hereby certify that on the 20th day of March, A. D. 1891, before me, James H. Wolfe, a notary public in and for the county of Philadelphia and State of Pennsylvania, at my office, No. 33 South Third street, in the city of Philadelphia, county of Philadelphia, and State of Pennsylvania, personally appeared, pursuant to the notice hereto annexed, between the hours of 9 o'clock a. m. and 5 o'clock p. m., Theodore D. Rand, one of the witnesses named in said notice; and the said Theodore D. Rand, being by me first duly *contained*

and sworn to testify the whole truth and being carefully examined, deposed and said as appeared by the deposition hereto annexed:

And I further certify that the said deposition was then and there reduced to writing by me and was, after it had been reduced to writing, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court, as required by law.

And I further certify that the reason why the said deposition was taken was that the said witness resides at Radnor, Delaware county, Pennsylvania, near the city of Philadelphia, more
43 than one hundred miles from the city of New Orleans, the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

And I further certify that the fee for taking said deposition, $12.50, has been paid to me by the plaintiff, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and
[SEAL.] official seal, at the city of Philadelphia, in the county of Philadelphia and State of Pennsylvania, this twentieth day of March, A. D. 1891.

(Signed) JAMES H. WOLFE,
Notary Public, Philad'a.

Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

THE COMMONWEALTH OF PENNSYLVANIA,
Eastern District of Pennsylvania,
City and County of Philadelphia, } *ss:*

THEODORE D. RAND, a witness called on behalf of the plaintiff herein and residing at Radnor, Delaware county, near Philadelphia, Pennsylvania, more than one hundred miles from the place where this case is to be tried, being cautioned and sworn to tell the whole truth and being carefully examined, deposes and says:

44 In answer to the first interrogatory he says:

I am an attorney-at-law of the city of Philadelphia and have been so engaged for more than thirty years.

In answer to the second interrogatory he says:

I do know the law and practice of our courts of the State of Pennsylvania and of the city and county of Philadelphia.

In answer to the third interrogatory he says:

It is the law and practice to enter judgment upon such warrant in the office of the prothonotary of the court with the same force and effect as a judgment rendered in open court. This has been the practice to my personal knowledge for over thirty years. The

act of 14th April, 1834, section 77 (Brightly's Purdon's Digest 1885, vol. 2nd, page 1379), provides that the prothonotaries of the several courts shall have and exercise power and authority, with full effect, in term time and vacation, to enter judgment at the instance of plaintiffs upon the confessions of defendants, but this act seems merely to confirm powers which the prothonotaries had had for a long time. I would refer to the following cases:

Cook *vs.* Gilbert (A. D. 1822), 8th Sergeant & Rawle, page 567; McCalmont *vs.* Peters (A. D. 1825), 13th Sergeant & Rawle, page 196.

In answer to the fourth interrogatory he says:

Prior to A. D. 1798 the lien of a judgment was without limitation as to time. The act of April 4th, 1798 (Purdon's Digest, page 819), provides that such lien shall not continue longer than five years unless the plaintiff shall within that time sue out a writ of *scire facias* to revive the same, and provides the mode of service of such writs of *scire facias*, and further provides that where the defendant cannot be found proclamation shall be made by
45 the crier in open court at two successive terms, and that unless cause be shown at or before the second term after the issuing of the writ the court shall order and direct the revival of the judgment on which such *scire facias* was issued.

In 1834 the supreme court, in Compher *vs.* Anawalt, 2nd Watts, page 490, stated that the judgment in that case was clearly not erroneous on its face, "having been entered after the return of two *nihils*, which by long-established practice warrants a judgment, though it must be confessed it is a practice liable to abuse. The refusal of the court below to open this judgment was a matter resting in their discretion and not assignable for error."

The practice has been so uniform and consistent that I do not find that it was ever questioned, but it is quoted by the supreme court in many cases in which germane questions arose. I would refer to the following: Fries *vs.* Watson (A. D. 1819), fifth Sergeant & Rawle, page 220. A judgment had been obtained and had been several times revived by *scire facias*, interest being included each time, and the defendant contended that this made compound interest, and that interest should be recovered on the original judgment only. The court in that case held that "as our act of assembly, made in the year 1700, directs that the plaintiff who takes out an execution may levy to the amount of his judgment and interest, it was decided by the supreme court in Benyhill *vs.* Wells, 5th Beimey, 56, that on *scire facias post annem et diem* execution might be awarded for the amount of the original judgment and interest. From this decision it may be inferred as to the recovery of interest there is no difference between a *scire facias* and an account of debt. I know that in strictness a *scire facias* is not an
action, but a demand of execution, but in substance it is the
46 same as an action."

Mans *vs.* Mans (A. D. 1836), 5th Watts, page 315: "The judgment given in a *scire facias* sued out here upon a judgment in debt is not merely an award of execution for the amount of the original

judgment, as it is in England, but, having an act of assembly which authorizes the recovery of the interest upon the whole amount of the original judgment, including both debt and damages allowed for the detention thereof from the date of its rendition, in order to meet this a judgment of *quod recuperet* is given for the aggregate amount of the first judgment, including both debt and damages as principal and interest thereon up to the time of entering it and an award of execution accordingly." In the same opinion the court says further: "Where no defence is made on the *scire facias* it is the business of the prothonotary, upon the judgment being entered, to calculate the interest and thus ascertain the amount for which the judgment ought to be entered and to set it down upon the record thereof." Shaeffer *vs.* Child (May, A. D. 1838), 7th Watts, page 84: "With us judgment on a *scire facias post annem et diem* is *quod recuperet*, not, as elsewhere, an award of execution, and our *scire facias*, to continue, was held in the case of Mason's Estate, 5th Watts, page 454, to partake of the same quality." Collingwood *vs.* Carson (A. D. 1841), Watts & Sergeant, vol. 2, page 220, September, 1841, cites Fries *vs.* Watson and says: "In England, if the money recovered in the judgment is not paid within a year, a *scire facias* must issue notifying the defendant to show cause why execution should not issue. If, after an award of execution, it be not levied until another year has elapsed, another *scire facias* must issue to show cause why execution should not issue, and so again. All these writs of *scire*
47 *facias* issue to show cause why an execution should not issue on the original judgment. The amount recovered on it remains unaltered; it bears no interest. In this State as early as 1700 it was enacted that interest should accrue on a judgment until the amount was paid, and when after a year and a day a *scire facias* issued the judgment for the plaintiff was that he should have execution for the amount of his judgment and interest until judgment on the *scire facias*. Thus the principal sum of the original judgment and interest on it became united and their amount was the sum for which judgment was entered on the *scire facias*. If this was not paid at the expiration of the year and it became necessary to issue another *scire facias*, it called on the defendant to show cause why he should not have execution on this last judgment, and, if no cause shown, judgment was given for the amount of the judgment on the *scire facias* and interest on it, and so on as often as a *scire facias* issued until the debt was paid. In Fries *vs.* Watson (5th Sergeant & Rawle, 220) this was objected to as in fact giving the plaintiff compound interest; but the court held themselves bound by the practice from the date of the law. This matter has in various shapes been presented to this court since. I shall cite one or two cases. In Mans *vs.* Mans (5 Watts, 318) it is said: The judgment on a *scire facias* in this State is that plaintiff shall recover (*quod recuperet*) the amount of the former judgment and interest. It has been decided that a judgment did not bind after purchased lands. A judgment on a *scire facias* has been often held to bind all lands then held by defendants, though purchased since the first judgment. 7 Watts, 84. It is in more than one of these cases

likened to debt on a judgment." And says further: "But our practice, as I have stated, was founded on a law of our own.
48 We know it has been uniform and universal for a century. It has been often said that the practice of the court is the law of the court."

In answer to the fifth interrogatory he says:

The is no statute as to the limitation of judgments, but the supreme court of Pennsylvania, in December, 1825, Cope *vs.* Humphrey *et al.*, 14 Sergeant & Rawle, page 15, decided that after the lapse of twenty years a legal presumption of payment arose, and this case has been uniformly followed.

In answer to the sixth interrogatory he says:

I know of no difference in the law or the practice, whether the defendant is or is not within the State.

In answer to the eighth interrogatory he says:

I do not entirely understand this question. As to revival made correctly, the law would be, I believe, the same whether the defendant were resident in or out of Pennsylvania. I cannot state the effect if the revival were incorrectly made. Some defects might be cured by the judgment; some might not.

In answer to the first cross-interrogatory he says:

The State of Pennsylvania is governed by the governor and the legislature. Its laws are partly statutory and partly the old common law of England modified by the decisions of its courts. The statutes are printed.

In answer to the second cross-interrogatory he says:

To answer this question categorically would require months of labor and reams of paper. To answer it as to what seems to me its true intent, I would say that the courts of Pennsylvania have largely followed the common law of England when not
49 changed by the legislature. As a result of this, the reports of the decisions of the supreme court do embrace most of the common law, modified in some respects by the court to better accord with the conditions existing in the United States.

In answer to the third cross-interrogatory he says:

The courts of Pennsylvania in Philadelphia and Allegheny counties are established by the constitution of the State; in the other counties they are continued by the constitution as established prior.

In answer to the fourth cross-interrogatory he says:

I see nothing in the exemplification to show the appearance of the defendant in person or the appearance of the defendant John Henry or by any attorney representing him, but such is not necessary, according to the practice in Pennsylvania, and, in fact, is never done. The judgment is entered by the prothonotary on the application of the plaintiff or his attorney, and it is not necessary that the defendant should appear personally or by counsel.

In answer to the fifth cross-interrogatory he says:

The entry of judgments by confession is not by statute, but by the uniform practice of the courts for more than a century.

In answer to the sixth cross-interrogatory he says:

I have already answered this in my reply to the fourth interrogatory-in-chief.

In answer to the seventh cross-interrogatory he says:

There is no prescribed form of sheriff's return in Pennsylvania, but the supreme court, in Sherer *vs.* Eastor Bank, 33rd Penna. Stats., 134, decided that *nihil* is a good return to a writ of
50 summons, saying, "It is true that '*nihil*' is considered as especially appropriate as a return to a writ of *scire facias*, yet that with us is but a writ of summons, so far as relates to the manner of its service." The return *nihil* does import that the defendant in the writ was not found, and judgment on two *nihils* imports that two successive writs were issued, and that the defendant was not found.

In answer to the eighth cross-interrogatory he says:

If I understand this question aright, its framer was under the impression that the issuing of a *scire facias* is the institution of a new suit, whereas it is merely the mode prescribed whereby the presumption of payment may be negatived or rebutted and the lien of the judgment extended. The law of Pennsylvania makes no distinction between residents and non-residents. I have already given the statutes authorizing the judgments.

In answer to the ninth cross-interrogatory he says:

In Pennsylvania actions are limited by statutes. Of these there are a number, which may be found *in extenso* in Brightley's Purdon's Digest, 1885, vol. 2, pages 1060, 1061, 1062, 1063, 1064, 1065, but these have no references to judgments. Against judgments there is no prescription or limitation in Pennsylvania, except, as before stated, that the supreme court has decided that after twenty years a presumption of payment arises.

In answer to the tenth cross-interrogatory he says:

No.

(Signed) THEO. D. RAND.

Subscribed and sworn to before me this 20th day of March, 1891.

[SEAL.] (Signed) JAMES H. WOLFE,
Notary Public, Phila., Pa.

51 Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

Interrogatories to be propounded to and answered under oath by Theodore D. Rand, Wm. Wagner, Jr., and —— Tchudy, witnesses for plaintiff, residing in Philadelphia, State of Pennsylvania.

1st. What is your business, and how long have you been so engaged?

2nd. Do you know the law and practice of your courts—of the

State of Pennsylvania and of the county thereof in which the city of Philadelphia is embraced?

3d. What is the law of and concerning entry of judgments upon confession notes according to the form of Exhibit A, attached hereto?

4th. What is your law and practice relative to the revival of such judgments, if any, by *scire facias* or otherwise, to keep the same executory?

5th. What is your law of prescription and statute of limitations as to judgments and as to subsequent actions upon judgments looking to their being kept executory?

6th. What is your practice and your law of and relative to defendants in judgments having removed from the State, and in what way, under such circumstances, are such judgments revived or writs or *scire facias* issued?

7th. It is contended in this case that after the original judgment was entered defendant left the State permanently and has never returned thereto, but has become a citizen of the State of
52 Louisiana since the year 1865.

It is averred that the judgments herein were revived by *scire facias* in the year 1870 and were sued upon here, the present domicile of defendant.

8th. What is your law relative to revival made as against such absentee, whether correctly or incorrectly made, now or in the year 1871?

Please state all that you may know that would be of benefit to plaintiff herein relative thereto the same is if particularly interrogated concerning same.

(Signed) W. S. BENEDICT,
PERCY S. BENEDICT,
Of Counsel.

CLERK'S OFFICE.

A true copy of the original, filed Feb'y 28, '91.
New Orleans, March 4th, 1891.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS *vs.* JOHN HENRY. } No. 9174.

Application for Commission to Take Testimony of Theodore D. Rand, Wm. Wagner, Jr., and —— Tchudy, Witnesses Residing in Philadelphia, Penn.

53 The defendant objects to each and all of the interrogatories direct except the first, for the reason that it appears that it is the intention to attempt proof of the written law of Pennsylvania,

its constitution and statutes, by parol evidence, when the act of Congress provides and prescribes the only method of proof in such cases, and that all and singular the matters inquired of are immaterial to any issue in this cause.

Subject to such exception and all other exceptions that can be made on the deposition being offered as evidence in this cause, the defendant propounds the following cross-interrogatories, to be answered by each of said witnesses:

1 X. Is the State of Pennsylvania governed by statute of the legislative assembly of the State? If yea, are such statutes printed or promulgated in any written or printed form?

2 X. Has the State of Pennsylvania any common law other than that evidenced by the reported decisions of its courts? If yea, from what source and to what extent is it a modification of the common law of England?

3 X. Are the courts of Pennsylvania established by statute, the State constitution, or by common law? If by statute, are the statutes written or printed?

4 X. If the "Exhibit A" attached hereto, but not served, the alleged exemplification of an alleged judgment on a cognovit or power of attorney to confess judgment, is there anything in the exemplification that shows the appearance of the defendant in person in any court confessing judgment or the appearance of the defendant, John Henry, in the court by any attorney representing
54 him and confessing judgment for him? If yea, point out in what part of the alleged exemplification such appearance and confession appears.

5 X. Is the law of your State relative to the matters inquired of in the 3d direct interrogatory contained in whole or in part in any public statute of the State? If yea, is it printed or written, and when was the same adopted and when altered or amended?

6 X. Is the law of your State relating to the revival of judgments by *scire facias* contained in any public statute or printed rule of any court of record? If yea, when was the same adopted and where is it to be found?

7 X. What in the law of your State is the exact import and meaning of a sheriff's return of *nihil* on a writ of *scire facias* to revive judgment? What is meant by judgment on "two *nihils*?" Does the return *nihil* mean defendant in writ not found or served?

8 X. If you answer the 6th direct interrogatory relative to decrees against persons not found or served within the State, state upon what statute of Pennsylvania the courts depend for authority to render judgment on *scire facias* against non-residents not served. When was it adopted and where is it to be found?

9 X. Are actions limited in your State by statute or common law? If by statute, when was it adopted and where can it be found as at present in force?

10 X. Are you or either of your counsel for the plaintiff in this

cause, either in this or any other cause in which he is a party or interested?

(Signed) J. R. BECKWITH,
Att'y for Def't.

CLERK'S OFFICE.

A true copy of the original, filed M'ch 3, 1891.
New Orleans, March 4, 1891.
[L. S.] (Signed) E. R. HUNT, *Clerk.*

55 *Order: Case Fixed.*

Extract from the Minute Book, April Term, 1891.

NEW ORLEANS, FRIDAY, *May* 29, 1891.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

On joint motion of counsel for the parties, it is ordered that this cause be fixed for trial on Saturday, June 6, 1891, on exceptions.

Order: Continuance

Extracts from the Minutes.

SATURDAY, *June* 6, 1891.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

On motion of counsel for the parties herein, it is ordered that this cause, set down for trial this day on the exception, be continued for the term.

Order: Case Assigned for Trial.

Extract from the Minutes.

56 NEW ORLEANS, FRIDAY, *November* 20, 1891.

B. OWENS
vs.
JOHN HENRY. } No. 9174.

On motion of W. S. and Percy S. Benedict, of counsel for plaintiff—

It is ordered that this cause be assigned for trial on the 11th day of December, 1891, at 11 o'clock a. m., and that counsel for def't be notified thereof.

Hearing & Submission.

Extract from the Minutes.

NEW ORLEANS, FRIDAY, *December* 11, 1891.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

This cause was called for trial.
Present: Percy S. Benedict, of counsel for plaintiff.
" J. R. Beckwith, attorney for defendant.
Whereupon the parties in the cause, by written stipulation, waived trial by jury and the cause was taken up before the court, the supplemental petition of plaintiff being amended in open court.
After hearing the pleadings, evidence, exhibits, and arguments of counsel the cause was submitted, when the court took time to advise.

57 *Stipulation as to Statutes and Construction. Filed Dec.* 11, 1891.

Circuit Court of the United States for the Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

It is stipulated and agreed in this cause that the defendant Henry in this cause has been a citizen of and domiciled in Louisiana since Sept. 8, 1865, as stated in his affidavit on file, and that the common law of Pennsylvania, the practice in her courts, and the construction placed upon any statute in force in that State may be proved by the decisions of the Pennsylvania courts as printed in the printed volumes of Pennsylvania Reports and all statutes by the printed publication thereof by authority of the State.
(Signed) J. R. BECKWITH, *Att'y for Def't.*
PERCY S. BENEDICT, *For Pl'ff.*

Agreement and Waiver of Jury. Filed Dec. 11, 1891.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

58 It is agreed that the matters of fact in defendant Henry's plea and exception are true in so far as facts are stated.
It is further agreed that a jury be waived in this cause.
(Signed) PERCY S. BENEDICT,
Attorney for Plaintiff.
J. R. BECKWITH,
Att'y for Def't Henry.

Suggestion of Death of Defendant Herein. Filed January 4, 1892.

Circuit Court of the United States, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

And now comes J. R. Beckwith, attorney for the said late John Henry, defendant herein, and suggests and makes known to the court here that the said John Henry departed this life on January 3d, 1892.

(Signed) J. R. BECKWITH,
Att'y of Record for Def't.

Motion to Make Testamentary Ex'r a Party, Order, and Exhibit. Entered and Filed January 8, 1892.

U. S. Circuit Court.

59

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

On motion of W. S. Benedict and Percy S. Benedict, of counsel for plaintiff herein, and on suggesting the death of defendant herein; that his succession has been opened in the civil district court, and Mr. Bernard McCloskey has qualified under the will of said deceased as testamentary executor thereof, and it is necessary that he be made party hereto to represent the interests of said defendant herein, and that plaintiff annexes hereto certified copy of letters testamentary to said McCloskey—

It is ordered by the court that Bernard McCloskey be made party in accordance with the foregoing motion.

Copy of Letters Testamentary. Filed Jan'y 8, 1892.

THE STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division B.

[Stamp.]

To all to whom these presents may come, Greeting:

Whereas Bernard McCloskey, named and appointed testamentary executor of the last will and testament of the late John Henry, deceased, has applied to the civil district court for the parish of Orleans by petition, praying said court to grant letters testamentary therein:

Now know ye that the said Bernard McCloskey — hereby author-

ized and empowered to collect all the goods and effects which
60 were of said John Henry, deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as testamentary executor of the said last will and testament.

Witness our hand and the seal of said court, at the city of New Orleans, this sixth day of January, in the year of our Lord one thousand eight hundred and ninety-two, and the hundred and sixteenth of the Independence of the United States of America.

(Signed) FRED. D. KING, *Judge.*
(Signed) EUGÉNE D'HÉRÉTÉ, *D'y Cl'k.*

A true copy.
[L. S.] HUGUES J. LAVERGNE, *D'y Cl'k.*

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, April Term, 1892.

NEW ORLEANS, FRIDAY, *June* 24, 1892.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

The parties in this cause having filed a stipulation waiving trial by jury and the cause having been heard at a former day
61 upon the pleadings, exhibits, evidence, and arguments of counsel and taken under advisement, the court, upon consideration thereof and being of opinion that the judgment claimed to have been rendered on the bond or obligation of defendant and which it is sought to revive was not formally entered according to the statutes of Pennsylvania, finds the issues of law and fact raised by the pleadings in favor of the defendant.

It is therefore ordered, adjudged, and decreed that there be judgment in favor of Bernard McCloskey, testamentary executor of John Henry, deceased, defendant, and against the demand of the plaintiff, Bernard Owens, dismissing this suit with costs.

Judgment rendered June 24, 1892.
Judgment signed June 29, 1892.

(Signed) DON A. PARDEE, *Judge.*

Rule for New Trial. Filed June 27, 1892.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

On motion of W. S. Benedict and Percy S. Benedict, of counsel for plaintiff, and on suggesting the entry of the decree herein on the 24th day of June, A. D. 1892, and on further suggesting there is error therein—

It is ordered by the court that defendant do show cause, on a day to be assigned by the court, why a new trial should not be
62 granted plaintiff herein on the following grounds, namely:

1. That the judgment is contrary to the law and the evidence.

2. That the acts, laws, rules, judgments, and regulations of each and every of the States are guaranteed as being of equal validity in all States.

3. That it has been testified to and not attempted to be denied that the judgment of revival on the original judgment and the writs thereunder issued are correct.

4. That justice is impeded by reason of the objections interposed, and by the fact that the claim herein asserted is not and never has been paid, nor averred to have been paid, and is due and owing, as specified in the papers on file.

5. For other reasons to be urged on trial hereof.

Order: New Trial Refused.

Extract from the Minutes.

TUESDAY, *June 28th*, 1892.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

This cause came on this day to be heard on the rule filed by the plaintiff for a new trial herein, Percy S. Benedict appearing for mover, J. R. Beckwith for the defendant, and was argued; whereupon and on consideration thereof it is ordered that a new trial be refused, and that the judgment remain undisturbed.

63 *Assignment of Errors. Filed July* 19, 1892.

U. S. Circuit Court, Eastern District of Louisiana.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

Assignment of Errors.

Now comes complainant and says:

1st. The court erred in its decree herein setting aside a judgment of a sister State revived under *scire facias*, as prescribed by the laws of said State, and therein there is error.

2nd. The court erred in its decree compelling complainant to elect upon either one or the other of the two judgments of said sister State declared upon, and therein there is error.

3rd. That complainant having elected to stand upon the judgment rendered under the stated *scire facias*, the court erred, and its decision thereon is violative of article IV, section one, of the Constitution of the United States, which says:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."

And therein, upon the court's decision thereon, there is error.

64 4th. The court erred in its interpretation of the law of the State of Pennsylvania of February 24th, 1806, which says (sec. 24):

"It shall be the duty of the prothonotary of any court of record within this Commonwealth, on the application of any person being the original holder (or the assignee of such holder) of a note, bond, or other instrument of writing in which judgment is confessed, or containing a warrant for an attorney-at-law or other person to confess judgment, to enter judgment against the person or persons who executed the same for the amount which from the face of the instrument may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant, particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed and judgment confessed by an attorney or judgment obtained in open court and in term time."

And in the decision of the court thereon there is error.

5th. The court erred, plaintiff having elected to stand upon the stated *scire facias* judgment, in its decision in going behind same and decreeing the original judgment on cognovit to be void.

And therein there is error.

6th. The court erred in its interpretation and construction of

the bond and warrant of attorney declared upon and of record herein.

And therein there is error.

Wherefore complainant prays the above and foregoing assignments in error may be filed and made part of the record herein, and the decree of the United States circuit court for the eastern district of Louisiana may be reversed according-.

(Signed) PERCY S. BENEDICT,
For Complainant.

65 *Petition for a Writ of Error. Filed July* 19, 1892.

BERNARD OWENS
vs.
JOHN HENRY. } No. 9174.

The petition of plaintiff herein with respect represents—

That he is advised there is error in the judgment herein against him in favor of defendant, signed on the — day of ——, 1892; that he is aggrieved thereby and is desirous of taking a writ of error therefrom, and has assigned error.

Wherefore he prays he be allowed a writ of error from said judgment to the Supreme Court of the United States, returnable within thirty days from the day of signing the citation, at the October term of 1892 of said court, upon furnishing bond, with good and solvent security, conditioned as the law directs, in a sum as directed.

(Signed) PERCY S. BENEDICT, *Of Counsel.*

Order.

Let a writ of error be granted petitioner, as prayed for, to the United States Supreme Court, returnable within thirty days from date hereof, on plaintiff's giving bond, with good and solvent security, in the sum of five hundred dollars.

July 13th, 1892.

(Signed) EDWARD C. BILLINGS, *Judge.*

66 *Bond for Writ of Error. Filed July* 19, 1892.

Know all men by these presents that we, Bernard Owens, of Philadelphia, Pennsylvania, as principal, William S. Benedict as surety, are held and firmly bound unto Bernard McCloskey, in his representative capacity of testamentary executor of the estate of the late John Henry, in the full and just sum of five hundred dollars, to be paid to the said John Henry, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a circuit of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in

a suit depending in said circuit court, wherein Bernard Owens is plaintiff and John Henry, defendant, judgment was rendered against said Owens, plaintiff, and the said Owens having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said McCloskey, test. executor of said Henry, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Bernard Owens shall prosecute his writ to effect and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and
67 virtue.

(Signed) BERNARD OWENS,
By PERCY S. BENEDICT, *Att'y.* [L. S.]
W. S. BENEDICT. [L. S.]

Bond and sufficiency of surety approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Bernard Owens, complainant, and John Henry, defendant, a manifest error hath happened, to the great damage of the said complainant, Bernard Owens, as by his said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 19th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

69 [Endorsed:] United States circuit court. No. 9174. Bernard Owens *versus* John Henry. Writ of error. Copy of a writ of error lodged in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in pursuance of the statute in such cases made and provided, this — day of July, one thousand eight hundred and ninety-two. Percy S. Benedict, attorney of plaintiff in error.

[Stamped:] No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed July 19, 1892. E. R. Hunt, clerk.

70 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Bernard McCloskey, Esq., testamentary executor of the estate of John Henry, deceased, defendant herein, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Bernard Owens, of Philadelphia, Pennsylvania, is complainant and John Henry, of New Orleans, Louisiana, late of Philadelphia, Pennsylvania, is defendant, to show cause, if any there be, why the judgment rendered against the said Bernard Owens, complainant, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

EDWARD C. BILLINGS, *Judge.*

71 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 9174. Bernard Owens *vs.* John Henry. Citation.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., July 19, '92, & on the same day I served a true copy of the within citation of appeal on Bernard McCloskey, testamentary executor of the estate of John Henry, deceased, defendant herein, by handing the same to him, in person, at his office, No. 130 Gravier St., in the city of New Orleans, La., & leaving the same in his hands.

J. B. DONNALLY,
U. S. Marshal,
By J. E. BOEHLER,
D'y U. S. Marshal.

On this day personally appeared before the undersigned authority J. E. Boehler, deputy U. S. marshal, who, being duly sworn,

deposes and says that the above return is true & correct as therein set forth; that service of citation was made on Bernard McCloskey, testamentary executor of est. of John Henry, dec'd, by handing same to him in person in New Orleans, La.

J. E. BOEHLER.

Sworn to and subscribed before me this 25th day of July, 1892.

E. R. HUNT, *Clerk.*

72 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 67 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial, in the case of Bernard Owens, plaintiff in error, *vs.* Bernard McCloskey, test'y executor of John Henry, defendant in error, No. 9174 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 26 day of July, A. D. 1892.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 26 day of July, A. D. 1892.

EDWARD C. BILLINGS, *Judge.*

Endorsed on cover: Case No. 15,099. E. Louisiana C. C. U. S. Term No., 784. Bernard Owens, plaintiff in error, *vs.* John Henry. Filed August 8th, 1892.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 143.

OCTOBER TERM, 1895: RECORD CASE NO. 15,099.

BERNARD OWENS,
Plaintiff in Error,

versus

JOHN HENRY, BY HIS EXECUTOR, BERNARD MCCLOSKEY,
Defendant in Error.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

Brief for Plaintiff in Error.

W.
S. BENEDICT,
Attorney for Plaintiff in Error.

L. GRAHAM & SON, LTD., 44-46 BARONNE ST., NEW ORLEANS.

deposes and says that the above return is true & correct as therein set forth; that service of citation was made on Bernard McCloskey, testamentary executor of est. of John Henry, dec'd, by handing same to him in person in New Orleans, La.

J. E. BOEHLER.

Sworn to and subscribed before me this 25th day of July, 1892.

E. R. HUNT, Clerk.

72 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 67 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial, in the case of Bernard Owens, plaintiff in error, *vs.* Bernard McCloskey, test'y executor of John Henry, defendant in error, No. 9174 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 26 day of July, A. D. 1892.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, Clerk.

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 26 day of July, A. D. 1892.

EDWARD C. BILLINGS, *Judge.*

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SUPREME COURT OF THE UNITED STATES.

No. 143.

October Term, 1895; Record Case No. 15,099.

BERNARD OWENS,

Plaintiff in Error,

versus

JOHN HENRY, by his Executor, Bernard McCloskey,

Defendant in Error.

Appeal from the United States Circuit Court for the Eastern District of Louisiana.

Brief for Plaintiff in Error.

Statement of the Case.

In the late District Court of Philadelphia, Pennsylvania, under the No. 88 of the D. S. B. docket, of date June 17, 1861, on a bond and warrant of attorney, a judgment was rendered and entered by the prothonotary in favor of plaintiff in error, and against John Henry and James Feeny, trading as John Henry & Co., for the sum of $10,000 conditioned for the payment of $5000, with interest from March 2, 1861 (see Record, pp. 3 and 4).

This proceeding was statutory; the prothonotary acted judicially, and execution issued *eo die* with the entry of the judgment. An execution writ upon this judgment, a customary *fieri facias* was returned by the sheriff as levied on certain personal property, sold for $285.97 July 11, 1861 (Record, foot pp. 4 and 5).

At the March term of same court, in the year 1866, a writ of *scire facias* to revive the above judgment was issued, made known to Feeny and returned *nihil habet* as to defendant John Henry (p. 5, docket entries Nos. 23 and 609). This first *scire facias* to revive was issued February 3, 1866, and returned the first Monday of March, 1866 (*Ibid.*).

A second *scire facias* was needed to warrant a revival against John Henry, on the return of *nihil habet;* the *praecipe* for same is found page 7, under date March 19, 1866, the writ of *scire facias* page 8. It may be said the *writ* of *scire facias* of date February 3, 1876, does not appear in the record, but the docket entry (p. 5) under the No. 23, shows its issuance; the *præcipe* therefor signed by J. P. Owens, the attorney authorized originally to enter judgment on the bond and warrant, upon page 6, and the recital in the second *scire facias* of March 19, 1866, line 22 from the top, that the sheriff had already returned *nihil habet* as to defendant Henry; hence there can be no doubt of its regular issuance. This latter *scire facias* (March 19, 1866) was also returned *nihil habet* as to defendant Henry (p. 8) and judgment was entered upon the docket, April 21, 1866, "for want of an affidavit of defence."

(Your Honors will find in the record two exemplifications, marked respectively "A" and "B." It is with exemplification "A" alone we are dealing, pp. 3 to 12 inclusive. This is the action founded upon the bond and warrant of attorney of the firm of John Henry & Co., composed of John Henry and James Feeny, confessed and signed by both (see pp. 3, 4). Exemplification "B" is founded upon a warrant confessed by John Henry alone, and as same had not been declared upon, it may be eliminated entirely. Hence pages 12 to 18 inclusive may be read from the record, same constitut-

ing a separate action, and having been inadvertently admitted herein.)

Five years again elapsed. At the March term of 1871 a writ of *scire facias* to revive above judgment was issued (pp. 6 and 7) similarly to the former writ of *sci. fa.* This latter writ of March 17, 1871, was returned *nihil habet* on the first Monday of April, 1871 (see return on writ, p. 7, and docket entry, p. 6, under No. 985).

At the next term, in accord with law, a second *sci. fa.* was issued (p. 9) under date of April 11, 1871, and returned as was the former, *nihil habet*, upon the first Monday in May, 1871. And on May 10, 1871, judgment was entered and damages assessed at $8482.50 " for want of appearance on two returns of *nihil*" (see p. 6, No. 1728).

On the record as thus condensed the present action was instituted November 1, 1880, in the United States Circuit Court for the Fifth Circuit and Eastern District of *Louisiana;* judgment prayed for $10,000, with 6 per cent. interest from March 2, 1861, costs, etc., subject to a credit of $287.97.

John Henry was personally cited November 2, 1880, and by his attorney filed on the 17th of same month a peremptory exception " no cause of action " (Rec., p. 19).

This exception was " sustained and plaintiff allowed to amend by declaring on which judgment he relied " (p. 20).

A supplemental petition was then filed (Rec., p. 20) *relying, if compelled to choose*, upon the *second* revival of judgment as above set forth, of date May 10, 1871. A peremptory exception was filed that " plaintiff's petition herein as amended and supplemented, and as the same is now of record herein, does not set forth, disclose or make any cause of action or right to recover against this defendant, by reason of anything contained in the record of this cause " (Rec., p. 23).

The answer follows (page 24). Defendant claims citizenship of Louisiana since 1864 (should be since September, 1865). Denies all jurisdiction of Pennsylvania courts over him, John Henry, and that all the judgments relied on are

null and void for want of legal process served upon him or by his voluntary appearance.

But one witness was examined (Rec., pp. 26 to 30 inclusive), T. D. Rand.

A jury trial was waived, and trial had by the court December 11, 1891; after hearing pleadings, exhibits and arguments, the cause was submitted. A written stipulation was filed that John Henry has been a citizen of Louisiana since September 5, 1865; that the common law is the practice in the courts of Pennsylvania, and that the construction placed upon any statute may be proved by the decisions of the Pennsylvania courts as printed in the volumes of the Pennsylvania reports, and all statutes by printed publication thereof by authority of the State (Rec., p. 34).

Defendant, John Henry, having died, on January 8, 1892, by motion Bernard McCloskey, his testamentary executor, was made party (p. 35).

On June 22, 1892, judgment was rendered in favor of Bernard McCloskey, testamentary executor, and against plaintiff, Bernard Owens. * * * "the court being of the opinion that the judgment claimed to have been rendered on the bond or obligation of defendant, and which it was sought to revive, was not formally entered according to the statutes of the State of Pennsylvania, finds the issues of law and fact raised by the pleadings in favor of defendant" (Record, p. 36). Although the foregoing recital is in the nature of a statement of facts as shown by the record, your Honors are respectfully requested to observe that the judgment is predicated on the alleged fact that the *original* judgment on the *bond* and *warrant* of *attorney was* not FORMALLY entered according to the statutes of the State of Pennsylvania, no allusion in any way being made to either judgment of *scire facias*, the latter one of which, May 10, 1871, having been relied upon by plaintiff when compelled by the court to elect.

After an unsuccessful rule for a new trial, plaintiff took his writ of error and filed his assignment of errors, July 19, 1892 (p. 38 *et seq.*).

Specification of Errors.

1. The court erred in its decree herein setting aside a judgment of a sister State revived under *scire facias*, as prescribed by the laws of said State, and therein there is error.

2. The court erred in its decree compelling plaintiff to elect upon either one or the other of the two judgments of said sister State declared upon, and therein there is error.

3. That complainant having elected to stand upon the judgment rendered under the stated *scire facias*, the court erred, and its decision thereon is violative of Art. IV, Sec. 1, of the Constitution of the United States, which says:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And therein, upon the court's decision thereon, there is error.

4. The court erred in its interpretation of the law of the State of Pennsylvania of February 24, 1806, which says (Sec. 24):

"It shall be the duty of the prothonotary of any court of record within this commonwealth, on the application of any person being the original holder (or the assignee of such holder) of a note, bond or other instrument of writing in which judgment is confessed, or containing a warrant for an attorney at law or other person to confess judgment, to enter judgment against the person or persons who executed the same for the amount which from the face of the instrument may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant, particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed and judgment confessed by an attorney or judgment obtained in open court in term time."

And in the decision of the court thereon, there is error.

5. The court erred, plaintiff having elected to stand upon the stated *scire facias* judgment, in its decision in going behind same, and decreeing the original judgment on cognovit to be void.

And therein there is error.

6. The court erred in its interpretation and construction of the bond and warrant of attorney declared upon and of record herein.

And therein there is error.

Wherefore complainant prays the above and foregoing assignments of error may be filed and made part of the record herein, and the decree of the United States Circuit Court for the Eastern District of Louisiana, may be reversed accordingly.

Preface to Argument.

We preface our argument with a brief recital of the general law of the United States, and that of the State of Louisiana, wherein this action was brought, bearing upon the issues presented in this appeal.

United States Constitution, Art. IV, Sec. 1: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In pursuance of which there was enacted by the Congress of the United States, May 22, 1790, set forth in the Rev. St. U. S., Sec. 905:

* * * "that the records and judicial proceedings of the courts of any State or territory, or of any such county, shall be proved and admitted in any other court in the United States by the attestation of the clerk and the seal of the court annexed, together with the certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every

court within the United States as they have by law or usage in the courts of the State from which they are taken."

Art. 752, Code of Practice, State of Louisiana: "Judgments rendered in the different courts of the United States shall import full proof in the courts of this State, if a copy of them, which is offered, be certified by the clerk in which they were rendered, be sealed with his seal, if there be one, and clothed with the certificate of the judge, chief justice or magistrate who presides in the court, as the case may be, declaring that the attestation is in due form."

And we here add the leading case on this subject in the jurisprudence of this Honorable Court, and which since its rendition has been repeatedly affirmed.

"Subject to the qualification that they are open to inquiry as to the *jurisdiction* of the court which gave them, and as to *notice* to the defendant, the judgment of a State court, not reversed by a superior court having jurisdiction, nor set aside by a direct proceeding in chancery, is *conclusive* in the courts of all the other States where the subject matter of controversy is the same." Christmas vs. Russell, 5 Wallace, 291.

Plaintiff in error, compelled by the court to elect, relies upon the judgment of *scire facias* of date May 10, 1871, maintaining, however, with leave of court, his right of action upon all (p. 21).

We therefore contend:

1. That a *scire facias* judgment is the continuation of a former suit when brought to revive a judgment (Bouvier Inst., Vol 4, p. 84).

2. That if the original judgment upon which the *scire facias* is predicated shows voluntary appearance or personal service of the defendant, and that the court has jurisdiction, such judgment of *scire facias*, however entered, is binding and conclusive in the courts of every other State from that in which it was rendered.

3. That it is not competent for the courts of the State of Louisiana to decide whether or not the courts of other States have misconstrued their own acts or laws, nor any inquiry be made as to the formalities required in such State, if the

record show appearance (either by personal service or voluntary appearance) and jurisdiction of the court.

4. That no plea can be urged by defendant in Louisiana in this action which he could not be permitted to raise if in Pennsylvania in a suit to revive the original judgment.

ARGUMENT.

Upon the 1st day of March, 1861, John Henry and James Feeny, trading as John Henry & Co., by bond and warrant of attorney, directed to John A. Owens, attorney of the Court of Common Pleas, at Philadelphia, Pennsylvania, confessed judgment in favor of Bernard Owens for the sum of $10,000, conditioned as therein stated. The bond, in its very tenor, recites the residence of all parties as at Philadelphia, the confessed liability of each, the waiver of all imperfections in the entering of the said judgment and any process or proceedings thereon, and is duly witnessed. In conformity with said bond and warrant, and as thereby authorized, judgment was duly entered thereon upon the 17th day of June, 1861, the law of Pennsylvania requiring its entry upon the docket in order to give notice thereof to the world (see Act of Pennsylvania, February 24, 1806, found in Purdon's Digest, Judgment 30. Also, Crutcher vs. Commonwealth, 6 Wharton, 340). This judgment appears upon the docket as No. 88 of June term of 1861, entitled Bernard Owens vs. John Henry, James Feeny (Record, p. 3).

It thus appears, without doubt, that at the date of the entering of said judgment John Henry and James Feeny were residents and citizens of the city of Philadelphia, State of Pennsylvania. Nor is this all. A *fi. fa.* regularly issued on June 17, 1861, was levied the same day upon the personal property of defendant and sold for $285.97 July 11, 1861.

Furthermore, upon institution of this action in Louisiana, it was admitted in defendant's affidavit (p. 23) that he had not been a citizen of the State of Pennsylvania since September 5, 1865, is true. Nor has there been an attempt made to show that prior to said date he was any but a citizen of Pennsylvania.

The exception and answer in this case are substantially the same, *i. e.*, "no cause of action." The defendant admits (affidavit, p. 23) that he was a citizen of Philadelphia, Pa., at the time the original judgment was entered, and as to that original judgment he has interposed no plea that he was never served or cited, *nor* has the statute of limitations been pleaded as against any of the judgments, either original or *scire facias*. So any question of prescription may be immediately eliminated.

It will appear by reference to the judgment of the court *a qua* (p. 36) that the learned judge dismissed plaintiff's suit upon the ground "that the judgment claimed to have been rendered on the *bond* or obligation of the defendant and which it is sought to revive was not *formally* entered according to the statutes of Pennsylvania," and finds for defendant.

It must be borne in mind throughout that plaintiff, compelled to elect, has relied upon the *scire facias* revival of May 10, 1871, which latter judgment has not been assailed in any particular, the court going behind not only this *scire facias* of May 10, 1871, but also behind the *scire facias* judgment of April 21, 1866, and decreeing, *not* that the defendant was not cited in the original judgment, *not* that the court had no jurisdiction, but, forsooth, that that Pennsylvania court had no power to formally enter up the judgment in the form it did.

That the proceedings above detailed that took place in the Court of Common Pleas of Philadelphia in June, 1861, are formal and correct, there is no doubt, as will be conclusively shown below, plaintiff, however, emphatically and strenuously denying the right of any court in the Union to raise such issue now. But conceding, *arguendo*, that same was not formally entered according to the statutes of Pennsylvania, how far is it competent for the Louisiana courts to inquire into its rendition.

The policy of the law in every State is to give notice to a defendant; it is founded on natural reason and justice; every one has the right to be heard and to urge his defences, and without notice this would be impossible and oppressive

and work a hardship and injustice; therefore, it is universal law that notice to defendant is primarily sacramental. *But*, after having been *personally* cited, or having *voluntarily appeared*, the law is equally inexorable that he must take advantage of this opportunity; he must urge his defences *then* or forever after hold his peace. In the case at bar defendant voluntarily appears, acknowledges his liability in the court of his domicile, according to the practice of the State of which he was then a citizen.

Thus, say we, the Louisiana courts can inquire, first, did the defendant have personal notice, or voluntarily appear; and, second, had the court which rendered the judgment jurisdiction. The record answers both in the affirmative. Constantly keeping the doctrine in mind announced in Christmas vs. Russell (5 Wallace, p. 291), we must inquire what interpretation has been placed upon the appearance by bond and warrant of attorney in the courts of Pennsylvania and elsewhere, as done by Henry, and whether such constitutes a voluntary appearance, and if so, the reason therefor, presuming, of course, that such court had jurisdiction upon the original rendition of such a judgment.

It is to be constantly remembered throughout this record that plaintiff has relied upon the stated judgment of *scire facias*, and if a *scire facias* be a judgment, which will be shown beyond a doubt, any former judgment upon which a *scire facias* has been predicated becomes *merged* in such *scire facias*, and it is incompetent for any court to go behind this latter judgment.

Let us first quote the decisions of the Louisana courts upon these questions, inasmuch as this appeal is prosecuted from said State.

In the case of Thomas Orman vs. Julian Neville, 14 La. An., p. 392, the plaintiff had obtained a judgment against the defendant in the State of Ohio; it was revived by *scire facias* subsequently; this latter judgment was the subject of the present demand against the defendant in Louisiana, to which State he had removed; the plea of prescription was plead by him to said *scire facias* judgment. The court say: "As ten

years have not elapsed since the *revival* of the judgment obtained by plaintiff against the defendant in the State of Ohio, the plea of prescription can not prevail in this instance."

In Morton & Hammer vs. Valentine, the leading case upon the subject in Louisiana jurisprudence (15 La. An. 150), plaintiff had recovered a judgment against the defendant in the State of Mississippi in 1841. Defendant removed to Louisiana in 1846; judgment was regularly revived in Mississippi at May term, 1852, although prescribed at that date by Mississippi laws. The record was brought to Louisiana in November, 1856, to recover said debt, and defendant was cited. The court say (p. 152): "A *scire facias* is an action. It is an *original* action when brought upon a recognizance, or to repeal patents. It is a *continuation* of a *former suit* when it is brought to revive a judgment (Bouvier Inst., Vol. 4, p. 84). * * * Neither is it any less a judgment because it is rendered upon a *continuation* of a former suit. * * * It admits of appeal and it interrupts prescription. * * * We think, therefore, it admits of no doubt that the conclusion of the court upon the final hearing upon the *scire facias is* something more than an execution. *It is* (as we have already said) *a judgment*. If so, then we are informed by the Constitution of the United States, and the act of Congress under it, what effect must given to this judgment in Louisiana. *It must have the same effect here that it has in the State of Mississippi*." (Italics by the court.) Const. U. S., Art. 4, Sec. 1; Act 1790, 26th May; C. P. 746. "What, then, is the effect of the judgment upon the *scire facias* in Mississippi? It is certainly to give vitality and life to a judgment which was inert and lifeless. In the language of the law, it revived it. It awarded execution upon the debt and charges recognized by the former judgment. Now, from what did the old debt receive its new life and vigor. The old judgment? That was inert. It must, then, if it has a new life, receive it from the new decree; the judgment upon the *scire facias*, which is the final judgment upon the proceeding." Citing Orman vs. Neville, *supra*.

In this case of Morton vs. Valentine, the judgment in Mississippi had already prescribed in that State before any at-

tempt was made by *scire facias* to revive it. But having been revived, long after the defendant had left the State of Mississippi, and the judgment of revival having been brought to Louisiana, the court would not concern itself with any but the *scire facias* judgment, saying (page 151): "We can not consider any defence which the defendant may have had to the *scire facias* in the State of Mississippi. He should have pleaded it there." Citing 12 An., p. 736.

And in the case of Bertron vs. Stuart, recently decided, 43 An., p. 1171, the court reaffirms the doctrine that such revival is binding upon the absentees, and to which we invite your Honors' attention.

"On general principles of *res judicata* (which applies equally to proceedings by *scire facias* as to any other action or suit), and on the further ground that this method of reviving a judgment is merely a supplementary stay in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defence to the *scire facias* any matter which existed before the rendition of the original judgment, and might have been presented in the former proceeding." 1 Black on Judgments, Sec. 493.

And this is the law in Pennsylvania.

"On a *scire facias* to revive a judgment, the defendant can make no other defence than either to deny the original judgment altogether, or to show that it has been satisfied. In no case, and under no circumstances, can the merits of the original judgment be inquired into."

Cardesa vs. Humes, 5 Sargent & Rawle, 68, 69.

Lyle vs. Williams, 15 Sargent & Rawle, 135.

"A judgment of revival is conclusive of the existence of the original judgment, with all its incidents of lien or otherwise." Irwin vs. Nixon, 11 Penn. State, 419.

"So in cases where a *scire facias* is to be regarded as a continuation of the original action and not a new suit, a judgment on the *scire facias* against a non-resident who was not served with notice of that proceeding and did not appear, will be held good in the courts of another State, *provided the*

court had jurisdiction over him in the original suit. See II Black on Judgments, Sec. 913.

In the State of New Jersey, the parallel of the case at bar found interpretation, and we submit it is entirely conclusive of this controversy.

We quote the syllabus *in extenso*, and follow with the pertinent remarks of his Honor, the Chief Justice:

ELASSER VS. HAINES, 18 ATLANTIC REP. 1095.

Syllabus.

A judgment founded on a recognizance entered in the court of a state on the return of two successive writs of *scire facias nihil habet* will be regarded as valid and conclusive in this State.

2. Such judgment is not a proceeding *coram non judice*, inasmuch as the act confessing the debt of record gives jurisdiction to the court over the person of the conusor.

3. A recognizance is not within the bar of the statute of limitations in this State.

In this case, in the course of a long and well-considered opinion, Chief Justice Beasley observed: "The inquiry therefore arises, and it involves the entire issue now before the court, how was it that judgment could go against a conusor who had not been served with the *scire facias?* The answer is that by the form of the procedure, of which the writs of *scire facias* formed a part, the conusor voluntarily made himself a party to the proceeding. He went into court and confessed a debt subject to a condition, with the knowledge that if he absented himself from the jurisdiction a judgment might be taken against him on the return of the two unserved writs of *scire facias*. Such was the legal effect of the act done by him; and, in intendment of law, he was held to have assented to such effect. If, when he confessed the debt, he had expressly consented, in pursuance of a local statute, to the entry of a final judgment of this nature on the return of two unserved writs of *scire facias*, it is presumed it would not be contended that a judgment entered in accordance with such stipulation would not have been of unquestioned validity; and

yet, as he is chargeable with the knowledge, when he entered into this recognizance, that such result would obtain, according to the laws then in force, the tacit assent to such procedure, that is necessarily to be implied, wants but little of the force that would have resided in such supposed positive agreement. Nor is there any hardship which can arise out of such an interpretation of this legal procedure. If the conusor has any defence which he desires to interpose to the movement to enter judgment against him, he has his day in court for that purpose; for he is aware that he has, to that end, until the return of the second writ of *scire facias*, and by the exercise of ordinary diligence he can keep himself informed with respect to the running of such writs. In such a course of law, nothing is perceived of which the defendant can justly complain. At all events, it is a proceeding to which he has voluntarily submitted himself, and has therefore impliedly assented to it from its inception to its obvious conclusion."

And in New York also has the appearance by defendant in a bond and warrant of attorney in the Court of Common Pleas of Pennsylvania been declared to be an *appearance*, of the same force as if defendant were served with citation in term time.

"An action may be maintained in the courts of New York on a judgment by confession entered in the Court of Common Pleas of Pennsylvania where the parties then resided, though no process was served upon the defendant, nor any personal appearance was made by him, nor any declaration was ever filed, since the appearance on the entry of the judgment, of the agent appointed by defendant in his warrant of attorney, constitutes an appearance by defendant and gives the court jurisdiction to render a judgment against him to the effect authorized by the warrant." Teel vs. Yost (N. Y. Appl.), 28 N. E. Rep. 353; 128 N. Y. 387; affirming 8 N. Y. S. 552.

And in Pennsylvania it has been held that if the judgment is regularly revived, the judgment of *scire facias* is valid, even if the original judgment be void. " A judgment regularly revived by *scire facias* is not void even if the original judgment was void. A *scire facias* is a substitute for an action of

debt elsewhere; the judgment on it is *quod recuperet*, instead of a bare award of execution; it, therefore, warrants the awarding of the execution. The last judgment can not be considered invalid, although it was entered on a *scire facias* issued on a previous judgment that was void."

Buff vs. Wynkoop, 74 Pa. St., p. 103; Buhler vs. Buffington, 43 Pa. St., p. 278; Custer vs. Detterer, 3 Watts & Sargent, p. 28.

"A judgment of a State court has the same credit, validity and effect, in every other court and within the United States, which it had in the State where it was rendered; and whatever pleas would be good to a suit thereon in such State, and none others can be pleaded in any other court within the United States." Hampton vs. McConnell, 3 Wharton, p. 234, cited in Digest S. C. Rpts., Vol 2, p. 1214.

"When the record of judicial proceedings in one State is given in evidence in the courts of another, the latter have no right to decide whether the courts of the former have misconstrued their own acts of assembly or whether such act is unconstitutional or not."

Kean vs. Rice, 12 L. R. 203.

Wharton's Digest, Vol. 1, p, 798.

And yet in the face of these adjudications, repeated, logical and consistent, the court *a qua* constitutes itself the supreme tribunal to judge the formality of the original judgment of a sister State, the record showing upon its face notice to defendant and jurisdiction.

II.

But the entry of the judgment is perfectly legal according to the practice of Pennsylvania, as also the several revivals by *scire facias*. The act of Pennsylvania of 1806, "in order to make the entry of a judgment, the prothonotary is compelled to make *an entry* on his *docket* of the date and tenor of the instrument of writing on which the judgment is founded," which under the act is an equivalent of a declaration.

"J. P. Owens. DOCKET ENTRIES.
"88.

"BERNARD OWENS, " "JOHN HENRY "and "JAMES FEENY.	Judgment entered on *bond* and *warrant* of *attorney dated March 1, 1861*, for $10,000 conditioned for the payment of $5000 on the second of March, 1862, with lawful interest on same. June 17, 1861. Judgment (p. 9 of record).

Does not this fully conform to the law? Does not the notary, in accord with said statute, make an entry in writing on his docket? Is it not the equivalent of a declaration? Does it not set forth the *date* (March 1, 1861) and *tenor of instrument* (bond and warrant of attorney) on which judgment is founded?

"The act especially provides that such entry on the docket "shall have the same force and effect as if a declaration had "been filed, and judgment confessed by an attorney, or "judgment obtained in open court in term time."

It is well to bear in mind that all these proceedings were had while Henry was a citizen of Philadelphia.

In Pennsylvania, a judgment entered by warrant of attorney has all the qualities of a judgment on verdict. (Bradden vs. Brownfield, 4 Watts, p. 474; St. Bartholomew's Church vs. Wood, 61 Penn., p. 896.) And without any further entry than the filing of a judgment bond and warrant was held to be good (Helveti vs. Rapp, 7 S. & R. 307).

But in 2d Wallace, Jr., 569, Cromwell vs. Bank of Pittsburgh, the court had occasion to construe this very act, and therein it said:

"No actual formal entry of judgment on any docket or other paper need be made by either court or prothonotary, to justify the issue of final process as on a judgment. If the party himself, prior to the præcipe for final process, have signed a paper meant to authorize such entry, whether such entry be expressed in the present or the past tense, it is enough. The clerk may enter judgment on his docket or make up a formal record at any time afterward; *e. g.*, if a party by writing, signed, says: 'In my proper person I this day appeared and confessed judgment to the plaintiff, etc., besides costs,' on this final process may issue, even though no more formal entry of judgment have been made on the

docket, or on the record by court, or prothonotary or anybody." See Brightly's Digest, 2 Vol., p. 2155.

No declaration is necessary on a *scire facias*. Ibid., citing 5 Sargent & Rawle, 147.

It will appear by reference to the deposition (p. 27) that the Supreme Court in Compher vs. Anawalt, 2 Watts, p. 490, "'stated that the judgment in that case was clearly not erroneous on its face, having been entered after the return of two *nihils*, which by long established practice warrants a judgment, though it must be confessed it is a practice liable to abuse. The refusal of the court below to open this judgment was a matter resting in their discretion and not assignable for error.' The practice has been so uniform that I do not find that it was ever questioned, but it is quoted by the Supreme Court in many cases in which germane questions arose."

The respective processes following the entering of the bond and warrant of attorney have been already set forth *in extenso* in the statement of facts in this brief, and we refer your Honors with every feeling of certainty to the exemplification A as appears in the record.

In the court *a qua* defendant cited (and which we now cite on our own behalf) the case of the Grover & Baker Sewing Machine Company vs. Radcliffe, 137 U. S. A perusal of the facts therein show its non-applicability to the case at bar. In the sewing machine case one of the defendants, John Benge, who was and had *always* been a citizen of the State of Maryland, confessed judgment by bond and warrant of attorney as a member of a partnership, which bond and warrant was made the basis of a judgment thereon in Pennsylvania. He never appeared in Pennsylvania, never was cited, the Pennsylvania court never had nor ever acquired any jurisdiction over him, the record does not show that he was served with process or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania, and the court rightfully therein declares that he can not be presumptively held to a knowledge of the laws of a State other than his own (p. 299).

Should the court allow the defendant at this day to repudiate an honest debt, *confessed in his own proper person, before his own forum*, the rights of a plaintiff in this regard would be forever subject to the probability of his judgment debtor crossing the river to another State to avoid his acknowledged liability. The fair State of Louisiana can not thus be made a haven, an asylum and a refuge for judgment debtors coming from other States to throw off the jurisdiction which has attached to them by reason of the *rem*, the first proceeding, nor will they be allowed to plead want of notice when they voluntarily absent themselves from their former State to preclude the possibility of personal citation forever after in any suit to revive the *rem*.

Nor will the State of Louisiana accord a judgment debtor of a foreign State greater rights than she accords her own citizens (43 An. 1171).

Respectfully referring your Honors again to Christmas vs. Russell, 5 Wallace; Elasser vs. Haines, 18 Atl. Rep. 1095, and Morton vs. Valentine, 15 La. An. 150, we say: That where a defendant has been *served*, or *appeared* in proper person, in an *original* proceeding in a court having *jurisdiction over him*, such judgment or any subsequent proceeding thereon in said forum is CONCLUSIVE in that court and every other court; nor can that court or any other ever be concerned with the fact that afterward he leaves her portals, he having been there accorded his every opportunity.

We respectfully pray that the judgment appealed from be reversed.

Respectfully submitted,

S. BENEDICT,
Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 143.

BERNARD OWENS, Plaintiff in Error,

v.

BERNARD McCLOSKEY,

Executor of John Henry, Deceased.

Supplemental Brief for Plaintiff in Error

GEORGE A. KING,
Of Counsel for Plaintiff in Error.

H. L. McQUEEN, PRINTER.

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No. 143.

Supplemental Brief for Plaintiff in Error.

This action, instituted in the Circuit Court of the United States for the Eastern District of Louisiana on the 1st day of November, 1880, is based upon a judgment of the District Court for the City and County of Philadelphia, in the State of Pennsylvania, originally entered June 17, 1861, and revived by two successive series of writs of *scire facias*, two of such writs being issued in 1866 and two in 1871. On each occasion two of these writs were issued at successive terms, and both returned "*Nihil habet.*" Judgments were thereupon entered, reviewing the former judgment.

The court below refused to enforce these judgments in Louisiana, and gave judgment for the defendant.

It is assigned for error (Record, p. 38) that the court below failed to give due effect to that provision of the Constitution of the United States (Art. 4, § 1) requiring that—

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," etc.

I. The Original Judgment.

Was the original judgment of June 17, 1861, regular and valid, constituting a good foundation for an action upon it in the courts, State or Federal, sitting in another State?

Upon this point the meagre statements of the grounds of the decision of the court below, together with the absence of an opinion in the record, leave it somewhat doubtful upon what precise ground the court was moved to hold, as it did, (p. 36) "that the judgment claimed to have been rendered on the bond or obligation of defendant, and which it is sought to revive was not formally entered according to the statutes of Pennsylvania."

The statute of Pennsylvania authorizing the entry of such a judgment by the prothonotary without the appearance of any attorney was before the court (see the statute in full in the original brief for plaintiff in error, p. 5). The judgment itself (p. 3) appears to follow the law and the tenor of the instrument with entire strictness.

We are here brought to the recent decision of this court in *Grover and Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287, where this court held that a judgment entered in Pennsylvania upon a bond and warrant of attorney against a citizen of Maryland could not be enforced in the latter State unless the terms of the instrument authorizing a confession of judgment were strictly pursued; and that in this respect knowledge of the statutes of Pennsylvania, or an acceptance of their contents, could not be imputed to the citizens of other States. It must here be remarked that not only was the defendant in that case not a citizen of Pennsylvania at the time he executed the warrant of attorney to confess judgment, but the warrant of attorney does not seem primarily to have

contemplated any proceedings in that State, but rather in New York,—its language (p. 290) being, "We hereby authorize any attorney of any court of record in the State of New York, or any other State, to confess judgment against us in the said sum, with release of errors," etc.

Quite contrary are the facts of the case at bar. Here the instrument under which the judgment was entered (Record, pp. 3, 4), describes all the parties thereto, obligors and obligee, as "of the city of Philadelphia." It is addressed "To John A. Owens, Esq., attorney of the court of common pleas at Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, or to any other attorney of the said court or of any other court, there or elsewhere"; and authorizes the appearance of such an attorney and confession of judgment "in the said court or elsewhere." It thus looked in all its provisions to a proceeding in the courts of Pennsylvania. It must have been made with direct reference to the laws of that State. Whether the simple entry of the name at the top of the judgment record (p. 3), "J. P. Owens," can be regarded as an express appearance by attorney is immaterial in this case, although the signature in full of "John P. Owens, Attorney for Plaintiff" to the praecipe for the *scire facias* issued in 1866 (p. 6 of Record), seems to indicate that the entry of the name was that of an attorney for the purpose of confessing judgment, and that such judgment would therefore have been valid even against a citizen of another State, in strict compliance with the rule laid down by this court in the *Grover and Baker* case.

But, whether this is so or not, the parties all had notice of the statute of 1806, which authorized the entry of such judgments "without the agency of an attorney, or declaration filed," and there was therefore no occasion for the interposition of an attorney. To hold otherwise would be to invalidate the practice of a century in Pennsylvania under these warrants of attorney.

II. Validity of the Judgments on the Writs of Scire Facias.

There is nothing in the objection that no personal service of any of the writs of *scire facias* was effected upon the defendant.

If, as above submitted, the original judgment of June 17, 1861, was regularly entered by a court having jurisdiction of the cause of action, and which had, by proper process, or, what is equivalent, by consent, obtained jurisdiction of the person of tha defendant, the plaintiff in the action had the right to take whatever steps were necessary by the laws of the forum to continue the judgment in force. When that court had once obtained jurisdiction of the person, that jurisdiction continued until the defendant was out of court, either by a judgment in his favor, dismissing the action, or by the rendition of a judgment against him and a satisfaction of that judgment.

It will hardly be denied that the court in which the judgment was rendered had jurisdiction to take all necessary steps in the same suit to continue its judgment in effect. Unless, therefore, the issuance of a writ of *scire facias* is regarded as a new and independent suit, it was perfectly regular to issue such writs and enter judgment thereon, provided at least the proceedings were legally taken, and the regular course of the common law were pursued.

It is perfectly well settled that the writ of *scire facias*, when issued to revive a judgment, is a mere continuation of the original action. Foster on *Scire Facias* (pp. 18, 19) says:

"We have already seen why it is required in personal actions to revive a judgment after a year and a day by *scire facias*. *Ante*, ch. i. p. 3; *Hiscocks* v. *Kemp*, 3 Ad. & E. 679; 2 Tidd's Prac. 8th ed. 1152; 2 V. Wms. Saund.

72 d, n. 3; Com. Dig. tit. Pleader, 3 L, 4. When thus issued to revive a judgment already obtained, which by lapse of time the law presumes to be executed, or to have been released, an opportunity is afforded to the defendant of pleading that the judgment is executed, or of showing a release or discharge of the debt, if he can, before the plaintiff shall have execution. It is in this case manifestly not an original proceeding, but the continuation of a former suit. 2 Tidd's Prac. 8th ed. 1175; 9th ed. 1103."

This court in *United States* v. *Payne*, 147 U. S. 687, 690, recognizes this principle in the following language:

"While a *scire facias* to revive a judgment is merely a continuation of the original suit, (*Frierson* v. *Harris*, 94 Am. Dec. 223, notes,) a *scire facias* upon a recognizance, or to annul a patent, or for other similar purposes, is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annul a patent. *Winder* v. *Caldwell*, 14 How. 434, 443; *United States* v. *Stone*, 2 Wall. 525, 535."

In the case of *Weaver* v. *Boggs*, 38 Maryland 255, cited and apparently approved by this court in *Grover and Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287, 297, there seems to be not only no denial of this rule, but it is fully admitted. The court says (pp. 262, 263):

"That the judgment on the *scire facias* was rendered without actual notice or service of the writ can not be disputed, and whatever force there may be in the argument that a *scire facias* is a judicial, and not an original writ, and that when a defendant has once been summoned to attend a court he is never discharged from the obligation to be there and respond to its orders, until he has been formally discharged without day, or has satisfied the duties imposed upon him by the judgment, when applied to a case where the *scire facias* is issued before the presumption of satisfaction of the judgment from lapse of time has arisen, it has none when applied to a case

like this. Here the record of the foreign judgment shows (and in this respect shows nothing more) that the original judgment was rendered in September, 1836, and the first writ of *scire facias* was issued thereon in December, 1868, more than thirty-two years after its rendition. The defendant for thirty years next before the issuing of this writ and up to the time this suit was instituted, was a resident and citizen of this State. At the time it was revived or attempted to be revived, the judgment was presumed to be satisfied by the law of the State where it was rendered, and the obligation of the defendant to be there and respond to it had presumptively ceased. If he had appeared in the Pennsylvania Court and pleaded to this writ, as he could have done if he had received notice of it, he would there have had a complete defence against the judgment on the *scire facias*, which is here made the foundation of the action against him. If this action had been brought (as it might have been) upon the original judgment it would have been met by the flat bar of our statute of limitations which had *nearly thrice* run against it. It is very obvious the plaintiff resorted to this method of reviving the judgment in a foreign jurisdiction by means of returns of *nihil*, as a substitute for, and without actual notice or service of the writs, for the very purpose of evading or avoiding the provisions of the laws of this State, which justly afford its citizens protection against such stale and antiquated demands. We have no hesitation in applying and enforcing in this case the rule to which we have adverted, and in treating this judgment as one rendered without notice or service of process, and of no validity as the foundation of an action here, whatever may be its effect in the State where it was rendered, or upon the property of the defendant, if any, there situated."

Here it will be seen that the judgment was in that case put upon the ground that "The obligation of the defendant to be there to respond to it had presumptively ceased." This distinctly recognizes that there *was* an obligation on the part of the defendant to be personally

or constructively in the court of the State where the judgment was originally rendered, and to be ready to respond thereto so long as the law of that State required him to do so.

Contrasting this state of facts with that found in the present case, it will be found that the plaintiff in this case proceeded in the strictest accordance with the laws of the State of Pennsylvania, in whose courts the original judgment was rendered.

Referring to the record (p. 27), it will be seen that "The act of April 4th, 1798 (Purdon's Digest, page 819), provides that such lien shall not continue longer than five years unless the plaintiff shall within that time sue out a writ of *scire facias* to revive the same, and provides the mode of service of such writs of *scire facias*, and further provides that where the defendant can not be found proclamation shall be made by the crier in open court at two successive terms, and that unless cause be shown at or before the second term after the issuing of the writ the court shall order and direct the revival of the judgment on which such *scire facias* was issued."

In this case the first attempt to revive the judgment was taken within five years from its rendition, and upon two returns of *nihil habet* the judgment was ordered to be revived. Again, before another five years had elapsed, the plaintiff, in 1871, took similar steps for the revival of the judgment, and with like results. At no time could the defendant say that he had been discharged, actually or constructively, from attendance upon court or from a duty to respond to its orders.

There was not, as in the case of *Weaver* v. *Boggs*, an attempt to evade the law of the State into which the defendant had removed by suing out the *scire facias* long after a presumption of payment had taken effect, both by the law of the place of the original judgment and by the

law of the new residence of the defendant. No advantage was taken of the defendant's absence, and the record does not disclose that he had, or could have made, any successful defense to either of the writs had he still been residing in Pennsylvania at the time of their issuance. Surely, it would be a harsh rule which would absolutely prevent plaintiffs from keeping judgments revived in the State of their rendition if the defendants happened to have removed from the State, yet this case can not be decided in favor of the defendant without announcing a rule which would in that respect be absolutely prohibitory; for it is impossible to suggest a single step which could have been taken by this plaintiff to keep his judgment alive in Pennsylvania which he did not take.

And here it is not unworthy of remark that the State of Louisiana, in which this judgment is sought to be enforced,—and where the Federal court sitting in that State has jurisdiction only by virtue of diverse citizenship, and must, therefore, proceed in precisely the same manner as a State court would,—has a provision for the revival of judgments in all respects analogous to the proceeding by *scire facias* as practiced by the common law, and as in force in Pennsylvania. Its law in this respect will be found in the Code of Practice, Article 3547:

"All judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments. *Provided, however*, that any party interested in any judgment may have the same revived at any time before it is prescribed, by having a citation issue according to law, to the defendant or his representative, from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived, and if such defendant be absent and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served.

"Any judgment revived as above provided, shall continue in full force for ten years from the date of the order of court reviving the same, and any judgment may be revived as often as the party or parties interested may desire."

The appointment of a curator *ad hoc*, herein provided for, is precisely the same in effect as the two returns of *nihil* required by the common law and the State of Pennsylvania for the revival of a judgment, notwithstanding the want of personal appearance of the defendant.

It is also proper for us to point out that the last judgment on *scire facias* having been rendered in Pennsylvania on May 10, 1871, and this action having been instituted in Louisiana on the 1st of November, 1880, the time was strictly within the period of limitation allowed by the law of Louisiana, which gives ten years for bringing suits upon all judgments rendered within or without the State. It is true that there is no plea of prescription or limitation in the record, and it is, therefore, not strictly incumbent upon the plaintiff to show that this suit was instituted within the legal period of limitation. The fact, however, that it was so instituted is here referred to as showing the strict regularity with which the plaintiff has throughout the course of this litigation proceeded at every step. It would be difficult to suggest anything more that the plaintiff could at any stage of the case have done to pursue his remedy against the defendant.

The practice has, in England, from time immemorial, been in all respects in accordance with that followed here, as regards the issuance of the writ, and the effect of two returns of *nihil habet*. Foster on *Scire Facias* thus states it (p. 354):

"The sheriff on the return of the *scire facias*, either returns *scire feci* or *nihil;* that is, that he has given notice to the defendant, or that he has nothing by which he can

make known to him. See the form, Thes. Brev. 227, 263, 228, 273; Tidd's Prac. Forms, 455; 2 V. Wms. Saund. 72 y, 6th ed."

And (p. 355):

"Where the sheriff returns *nihil* the plaintiff must sue out a second or *alias* writ of *scire facias*, commanding the sheriff as before he was commanded (4 Inst. 472; *Randal* v. *Wade*, Cro. Jac. 59). And formerly, if the sheriff also returned *nihil* to the second writ, and the defendants did not appear, there was judgment against them, by default (*Barrett* v. *Clydon*, Dyer, 168 a; Com. Dig. Pleader, 3 L, 8, 9) two *nihils* being deemed equivalent to a *scire feci* (Ratcliffe's case, Dyer, 172 a; 2 Wms. Saund. 6th ed. 72 x)."

The highest court of Kentucky, as far back as 1822, recognized the legality of this practice, and enforced a Virginia judgment in *scire facias*, entered upon a return of two *nihils*, even when founded on an undertaking of bail, where, of course, there was no previous judgment to revive. *Delano* v. *Jopling*, 1 Littell, 417.

One point of the syllabus was:

"4. A judgment rendered in Virginia, on a *scire facias* against special bail, upon a return of the first writ, 'not found, and no inhabitant of my bailiwick,' and of the second, 'no inhabitant of my bailiwick,' is a judgment of a sister State, to which full credence ought to be given, under the Constitution of the United States."

The court said:

"That a judgment rendered against the defendant in an original action, without service of process is a nullity, is a position strongly supported by the authorities cited, and would command our assent. This court decided, in the case of *Moore, etc.* v. *Farrow and McMurtry*, spring term, 1821, that a sale of land, made under an execution which issued on a decree rendered without either actual or constructive service of process, passed no title. But is a *scire facias* like

this, founded on matter of record, subject to the same rule? We conceive not; and many reasons may be given why it should form an exception. In an original suit, the defendant may not know of the record, and he is no party, until notice is given him; and, therefore, his right ought not to be prejudiced. The demand against him rests upon evidence *en pais*, and is not defined or settled by adjudication. Widely different is the case of special bail. His undertaking is of record, to which he becomes a *quasi* party, and binds himself to take notice how it progresses. The proceedings and judgment against the principal, are conclusive as to him, and he must abide by the determination, without more right to dispute it, than his principal has. His undertaking of record, is, that the principal shall satisfy and pay the costs and future condemnation of the court, or render his body in execution for the same; or, in case of failure, the bail will do it for him. He is bound to know how the record progresses; whether the defendant is condemned, and whether he fails to pay the condemnation or surrender his person. It would not be arbitrary, in such case, to say, that judgment should be rendered at once against the bail, in future cases, without any process, on its appearing by execution that the principal could not be taken. The bail would only be made liable commensurate with his undertaking of record. Hence, a *scire facias* is styled a judicial writ; that is one for the purpose of effectuating what has already been settled by adjudication. It is true, in the case of bail, as well as in the revival of judgments, the writ must issue, out of a tender regard to the rights of the bail, in order that he may avail himself of some matter which has arisen since the judgment or undertaking of record. That judgment is conclusive against him, as to all previous matters. But, by the common law, which Virginia adopted, this judicial process need not be always personally executed. Two writs returned '*nihil*,' was always held sufficient to authorize execution against the bail. Without traveling into the origin of the return technically styled '*nihil*,' suffice it to say, that it means that the person was not accessible. The return in this case means neither less nor more; and it is competent for